

DOCKET

10
No. 88-1369-CSY
Status: GRANTED

Title: Maryland, Petitioner
v.
Jerome Edward Buie

Docketed:
February 16, 1989

Court: Court of Appeals of Maryland

Counsel for petitioner: Bair, Gary E.

Counsel for respondent: Henderson, Dennis, Kopolow, John L.

Entry	Date	Note	Proceedings and Orders
1	Jan 17 1989	G	Application (A88-570) to extend the time to file a petition for a writ of certiorari from January 17, 1989 to February 16, 1989, submitted to The Chief Justice.
2	Jan 18 1989		Application (A88-570) granted by the Chief Justice extending the time to file until February 16, 1989.
3	Feb 16 1989	G	Petition for writ of certiorari filed.
4	Mar 22 1989		DISTRIBUTED. April 14, 1989
5	Apr 12 1989	P	Response requested -- CJ, BRW. (Due May 12, 1989)
6	May 11 1989		Brief of respondent in opposition filed.
7	May 11 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	May 16 1989		REDISTRIBUTED. June 1, 1989
9	Jun 5 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Jun 5 1989		Petition GRANTED.
11	Jun 15 1989		***** Record filed.
15	Jul 19 1989	*	Certified copy of original record received.
12	Jul 20 1989		Brief amici curiae of Americans for Effective Law Enforcement, et al. filed.
13	Jul 20 1989		Joint appendix filed.
14	Jul 20 1989		Brief of petitioner Maryland filed.
16	Jul 20 1989		Brief amicus curiae of United States filed.
17	Jul 26 1989	G	Brief amicus curiae of Appellate Comm. of CA District Attorneys Assn. filed.
19	Aug 7 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
20	Sep 2 1989		Order extending time to file brief of respondent on the merits until September 2, 1989.
21	Sep 25 1989		Brief of respondent filed.
22	Sep 26 1989		Motion of the Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
23	Sep 29 1989		SET FOR ARGUMENT MONDAY, DECEMBER 4, 1989. (4TH CASE)
24	Sep 29 1989	X	CIRCULATED.
25	Dec 4 1989		Reply brief of petitioner Maryland filed.
			ARGUED.

**PETITION
FOR WRIT OF
CERTIORARI**

88-1369

Supreme Court, U.S.
FILED

FEB 16 1989

No.

JOSEPH F. SPINDOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

— STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF MARYLAND

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QUESTION PRESENTED

Where police possess arrest warrants for two armed robbery suspects, is it reasonable under the Fourth Amendment for the officers, after arresting one suspect in his home, to make a cursory check of the premises to determine whether the accomplice or other persons are present?

PARTIES

The caption contains the names of
all the parties below.

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1988

STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

The petitioner, the State of Maryland, respectfully requests that a writ of certiorari issue to review the judgment and opinion of the Court of Appeals of Maryland.

OPINIONS BELOW

The reported opinion of the Court

of Appeals of Maryland, Buie v. State, 314 Md. 151, 550 A.2d 79 (1988), reversing Respondent's conviction, is reproduced in the Appendix (Apx. 1- 45).

The reported opinion of the Court of Special Appeals of Maryland, Buie v. State, 72 Md. App. 562, 531 A.2d 1290 (1987), affirming Respondent's conviction is reproduced in the Appendix (Apx. 46-81).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent's conviction was filed on November 28, 1988. On January 18, 1989, Chief Justice Rehnquist ordered that the time for filing the petition for writ of certiorari be extended to and including February 16, 1989.

Jurisdiction of this Court is

invoked pursuant to 28 U.S.C. §1257(a) and Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution,
Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 3, 1986, Detective Joseph Frolich of the Prince George's County Police Department obtained a warrant for the arrest of Respondent

Jerome Edward Buie. (E. 9).¹ Buie and Lloyd Allen, for whom the police also obtained a warrant, were suspected of having robbed, at gunpoint, a Godfather's Pizza restaurant on February 3, 1986. (E. 9).

Two days later, on February 5, 1986, Buie was arrested in his home and a red running suit was seized. (E. 10-11). A victim of the robbery had said that one of the robbers wore a red running suit. (E. 11).

A pre-trial hearing was held in the Circuit Court for Prince George's County, Maryland, on December 2, 1986,

¹ In the Court of Appeals of Maryland, the transcript of the hearing on Buie's motion to suppress was included in the appendix to Buie's brief. The references to the record herein are based upon the page designations used in that appendix.

pursuant to Buie's motion to suppress the red running suit. Detective Frolich and another member of the Prince George's County Police Department, Corporal James Rozar, were the only witnesses. Both were called by the State, and their combined testimony disclosed the following.

Before the arrest warrant was executed, a secretary from Detective Frolich's office telephoned Buie's residence to determine if Buie was there. (E. 16). A woman answered, and the secretary spoke with Buie. (E. 16). Frolich and five or six other officers, including Corporal Rozar, then went to Buie's home. (E. 12). It was mid-afternoon; there were one or two young girls on the steps outside of the house. (E. 5-6, 15).

Rozar entered the house and spoke with Sergeant Dunn, who was then on his way upstairs. (E. 3). Buie had not yet been located. Dunn told Rozar that he had secured the first floor but not the basement. (E. 3). Dunn also said that he had "yelled down into the basement," but had not received a response. (E. 3). Rozar agreed to "freeze" the basement, so that "if there were someone in the basement they couldn't come up behind us." (E. 3-4).

Rozar pointed his service revolver down the basement stairs and yelled twice for anyone there to ascend. (E. 4). Rozar eventually heard a voice ask, "who is it?" (E. 4). Several times Rozar identified himself as a policeman and said "show me your hands." (E. 4).

Rozar finally saw a pair of hands come around the bottom of the stairwell. (E. 4). Rozar then instructed the person to come forward to where he could be seen. (E. 4). When the person, who happened to be Buie, did so, Rozar ordered him to ascend the stairs. (E. 4). When Buie stopped to pick up a pair of sneakers, Rozar told him to leave the sneakers alone. (E. 4). Buie then came up the stairs, whereupon Rozar arrested him. (E. 4).

After Rozar handcuffed Buie,²

² Rozar was asked if, upon arresting Buie, he had searched Buie and the area at the top of stairs immediately surrounding Buie. Rozar explained that such a search was unnecessary because he was not then "worried about there being any danger." (E. 8). From this testimony, the majority of the Court of Appeals of Maryland concluded that Rozar believed that no danger existed from anywhere in the house. (Apx. 5). If relevant, a fair reading of Rozar's Cont'd

Frolich descended the stairs "in case there was someone else in the basement." (E. 14). In the basement, Frolich saw the red running suit laying on a stack of clothing and seized it. (E. 11, 14).

Seeking suppression of the running suit, Buie claimed that once the police arrested him, they had no authority to search his basement without a search warrant. (E. 16-19). The trial court denied Buie's motion to suppress, saying (E. 20):

I think they had a right to search him and I think they had a right to seize, based on the facts of this case. The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious

testimony suggests that he simply believed that Buie no longer posed any danger.

offense.

I think the police acted reasonably in this case and if they had gone back to get a warrant, that wouldn't have been there.

The State introduced the running suit at Buie's trial. On December 3, 1986, a jury found him guilty of robbery with a deadly weapon and use of a handgun in the commission of a felony. On December 30, 1986, Buie was sentenced to a total of 35 years in prison.

The Court of Special Appeals of Maryland affirmed the judgment of the trial court. The Court of Appeals of Maryland, in a four to three decision, reversed Buie's conviction, finding that the sweep search of Buie's basement and the seizure of the red running suit "were unconstitutional because they violated rights established by the

fourth amendment to the United States Constitution." (Apx. 2).

REASONS FOR GRANTING THE WRIT

Both the trial court and the intermediate appellate court upheld, as reasonable, the cursory check of Buie's basement for third persons immediately after Buie's arrest. By a sharply divided vote, the Court of Appeals of Maryland concluded that such a brief, superficial search cannot take place without full probable cause to believe that third persons are on the premises. Finding probable cause lacking, the court held that the cursory search violated the Fourth Amendment.

This Court has yet to rule on the propriety of sweep searches for third persons incident to in-home arrests. With this case, the Court can employ

rationales already approved in its prior cases to define the lawful limits of police conduct in these frequently occurring and inherently volatile situations. In so doing, this Court necessarily will resolve the conflict that exists among the federal courts of appeals.

I. Previously Recognized Rationales Justify Sweep Searches.

At least two rationales exist for permitting the type of search at issue. One rationale is officer safety. A second rationale is law enforcement, which can include preservation of evidence and execution of open arrest warrants. Previously, this Court has employed these same rationales to permit full warrantless searches for weapons and evidence within a well-defined space

surrounding the arrestee. See Chimel v. California, 395 U.S. 752 (1969); United States v. Robinson, 414 U.S. 218 (1973); New York v. Belton, 453 U.S. 454 (1981).

Here, although the rationales for the intrusion remain the same, the search is for persons -- not evidence. Accordingly, the intrusion is not a general, exploratory rummaging, but is akin to the limited, superficial search allowed in cases such as Terry v. Ohio, 392 U.S. 1 (1968) (frisk of person), and Michigan v. Long, 463 U.S. 1032 (1983) (frisk of automobile).

Consonant with the Fourth Amendment and consistent with this Court's pronouncements in Chimel, Robinson, Belton, Terry, and Long, the cursory check at issue is eminently

reasonable. It merely allows police officers, who have lawfully crossed the threshold of the home and arrested the homeowner, to walk quickly through the house to look for persons who could interfere with the arrest or destroy evidence, or who are themselves subject to arrest. Of course, the brief pass-through would only encompass those places where a person could hide.

II. The Federal Courts of Appeals Are In Conflict.

The sharply divergent positions taken by the seven members of Maryland's highest court reflect the conflicting approaches of federal jurisdictions that have addressed the issue of cursory sweep searches. The conflict is substantial.

Like the dissenters in this case, some courts consider the totality of the

circumstances, balancing the exigencies of the situation against the limited nature of the intrusion. See, e.g., United States v. Baker, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978).

Other courts require a specific level of objective justification before validating a sweep search, but disagree on the necessary quantum and focus of suspicion. Some courts, like the majority in this case, apply a probable cause standard. The First Circuit, for example, requires both exigency and probable to believe that evidence is on the premises. United States v. Gerry, 845 F.2d 34, 36-37 & n.1 (1st Cir. 1988). The Fifth Circuit also requires probable cause, but focuses upon the threat to officer safety. United States

v. Kolodziej, 706 F.2d 590, 597 (5th Cir. 1983).

In stark contrast, the Ninth Circuit imposes a requirement that officers harbor only an articulable suspicion that there are third persons on the premises who pose a threat to officer safety. United States v. Castillo, 844 F.2d 1379, 1386 (9th Cir. 1988). See also United States v. Gardner, 627 F.2d 906, 909-10 (9th Cir. 1980).³ And, the Eleventh Circuit speaks

³ The Gardner decision, authored by now Justice Kennedy, also holds that police need only have an articulable suspicion that their safety is threatened. In a footnote to the opinion, the court observed that "[t]he circumstances under which a protective search of a residence may be conducted are not yet completely settled," and that "the different circuits appear to apply the standards for evaluating the constitutionality of such searches in somewhat different ways." 627 F.2d at 910 n.3.

in terms of reasonable belief, saying a reasonable belief of danger exists if there is uncertainty as to whether third persons might be present who pose a threat to the officers or who need assistance. United States v. Caraza, 843 F.2d 432, 435 (11th Cir. 1988) (per curiam).

These conflicts make this case appropriate for the Court's consideration. The Court can provide much needed guidance to lower courts, as well as law enforcement officials, on an "important and recurring issue of Fourth Amendment law." United States v. Jackson, 107 S.Ct. 308 (1986) (White, J., dissenting from denial of certiorari in a case involving a sweep search).

III. A Uniform Standard Is Necessary.

"[T]he protection of the Fourth and Fourteenth Amendments 'can only be realized if the police are acting under a set of rules which, in most instances, makes it possible to reach a correct determination beforehand as to whether an invasion of privacy is justified in the interest of law enforcement.'" Belton, 453 U.S. at 458 (quoting LaFave, "Case-By-Case Adjudication" Versus "Standardized Procedures": The Robinson Dilemma, 1974 S.Ct. Rev. 124, 142). Currently, there is no "'singular, familiar standard . . . to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront.'" Id. (quoting Dunaway v. New

York, 442 U.S. 200, 213-14 (1979)).

Either as an exception to the warrant requirement or in recognition that the cursory search at issue here is inherently reasonable, the Court can use this case to fashion a standard so that police officers and courts can respond in a fashion that ensures that the protection of the Fourth Amendment is realized. To be responsive to both law enforcements needs and privacy interests, the standard need not require police officers to have full probable cause to believe that other persons are on the premises.

CONCLUSION

A review of the facts of this case leads to the inescapable conclusion that the police acted in an entirely appropriate manner. They had a right and a

duty to make certain that third persons, including Buie's confederate Lloyd Allen, were not in Buie's basement. Because the limited, cursory search is a reasonable law enforcement practice, this Court should take the opportunity to correct the error below, resolve the existing conflict among the lower courts, and make it clear that police officers, who face similar situations on a day-to-day basis, are entitled to use this limited technique to ensure their safety and to accomplish legitimate law enforcement needs.

For these reasons, Petitioner requests this Court to issue a writ of

certiorari to the Court of Appeals of Maryland.

Respectfully submitted,

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Reported opinion of the Court
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IN THE COURT OF APPEALS OF MARYLAND

No. 161

September Term, 1987

JEROME EDWARD BUIE

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,

JJ.

Opinion by Adkins, J.
Murphy, C.J., Rodowsky, and
McAuliffe, JJ., dissent.

Filed: November 28, 1988

The warrantless search and seizure of a residential basement produced a red running suit that was instrumental in the conviction of petitioner, Jerome Edward Buie (Buie), of armed robbery and the use of a handgun in the commission of a felony. We shall hold that the search and seizure were unconstitutional because they violated rights established by the fourth amendment to the United States Constitution. The warrantless search of the basement was not supported by probable cause to believe that the requisite exigent circumstances existed.

At Buie's jury trial in the Circuit Court for Prince George's County (Jacob S. Levin, J., presiding) part of the evidence produced by the State was the red running suit. A witness to the robbery identified Buie as one of two

robbers, and more specifically, as the one who wielded a handgun and wore a red running suit. The red suit had been seized from Buie's basement under circumstances explained at his unsuccessful motion to suppress that damning piece of evidence.

Facts before Judge Levin at the suppression hearing established that two men had robbed a Godfather's Pizza Restaurant on 3 February 1986. On that same date the police obtained arrest warrants for Buie and his alleged accomplice, Lloyd Allen (Allen). Buie lived at 5400 67th Avenue, Riverdale, Prince George's County. That dwelling was under police surveillance, apparently from the time of the issuance of the arrest warrant. On 5 February, around mid-afternoon, the police, it

seems, satisfied themselves that Buie was at home. They did this by arranging to have a telephone call made to Buie's dwelling; the call verified Buie's presence, and that of a young woman, at that location.

Arrest warrant in hand, the police went to 5400 67th Avenue. They had no search warrant. The party numbered six or seven officers. They entered the home and began to look for Buie on the first and second floors. A Corporal Rozar arrived; he ascertained that the other officers had not yet "cleared the basement" of the house. Rozar undertook to "freeze the basement" by standing at the top of the basement stairs so anyone who might be there could not come up behind the other officers. With service revolver drawn, Rozar twice "yelled down

to the basement for anyone down there to come out." When a voice inquired as to who was calling, Rozar said it was the police. Eventually, Buie emerged from the basement, ascended the stairs, and was searched, handcuffed, and arrested by Rozar.

At that point Detective Frolich entered the basement; he noticed, in plain view, a red running suit "that fitted the description ... as being a jumpsuit worn by one of [the robbery suspects];" he seized it. It bears repeating that the police had no search warrant. To the best of their knowledge, Buie and an unidentified girl or woman were the only occupants of the dwelling. Rozar testified that he was not concerned about any danger. Frolich testified that he entered the basement

"in case there was someone else [there]."

Based on this evidence, Judge Levin decided

they had a right to search and they had a right to seize, based on the facts of this case. The man comes out from a basement, the police don't know how many people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a [search] warrant, that wouldn't have been there.^[1]

¹ Judge Levin's apparent alternative basis for approving the search and seizure seems to have been founded on some notion of a search for evidence justified because the running suit "wouldn't have been there" had the police sought a search warrant. In view of Stackhouse v. State, 298 Md. 203, 468 A.2d 333 (1983), the State wisely has not attempted to gain affirmance on that basis.

He denied the motion to suppress.²

² During the course of the trial, the State "reopened" the suppression hearing, apparently to produce additional evidence to support the favorable ruling it had already received. At this hearing, Detective Frolich, over Buie's objection, testified that on the day of Buie's arrest, Frolich had an arrest warrant for Buie's alleged accomplice, Allen; that Allen was still at large; that Allen and Buie had been arrested in the preceding November for another armed robbery; that Buie and Allen "were running together"; and that a handgun had been used in the February robbery. Frolich also had an extraordinary return of memory. He now recalled that he had entered the basement specifically "[t]o see if the co-defendant, Mr. Allen, may be in the basement." Judge Levin renewed his denial of the motion to suppress.

"In determining whether the denial of a motion to suppress ... is correct, the appellate court looks to the record of the suppression hearing, and does not consider the record of the trial itself." Trusty v. State, 308 Md. 658, 670, 521 A.2d 749, 755 (1987) [citation omitted; ellipsis in original]. Nor will an appellate court consider the record of a suppression hearing, "reopened" at the State's request, when the trial court has previously denied a motion to suppress evidence. "If the Cont'd

The Court of Special Appeals affirmed the trial court's denial of the motion to suppress the running suit, holding that the warrantless search and seizure were reasonable because "if there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause -- reasonable suspicion -- should be sufficient to justify a limited additional intrusion to investigate the possibility of their presence." Buie v. State, 72 App. 562, 576, 531 A.2d 1290, 1297 (1987) [emphasis in

court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, in the exercise of its discretion, grants a hearing de novo on a renewal of the motion." Md. Rule 4-252(g)(2). In this case there was no renewal of the motion. Thus, the trial judge should not have reopened the suppression hearing, and any evidence introduced at the reopened hearing will not be considered on appeal.

original]]. We granted certiorari to decide the important issue involved.

The fourth amendment provides that "[t]he right of the people to be secure in their ... houses ... against unreasonable searches and seizures shall not be violated...." U.S. Const. amend. IV. See also Steagald v. United States, 451 U.S. 204, 212, 101 S. Ct. 1642, 1647, 68 L. Ed. 2d 38, 45 (1981) ("'[T]he Fourth Amendment has drawn a firm line at the entrance to the house.'"); Payton v. New York, 445 U.S. 573, 576, 100 S. Ct. 1371, 1374-1375, 63 L. Ed. 2d 639, 644 (1980) (police may not make a warrantless entry into a suspect's home in order to make a routine felony arrest); Silverman v. United States, 365 U.S. 505, 511, 81 S. Ct. 679, 683, 5 L. Ed. 2d 734, 739

(1961) ("At the very core [of the Fourth Amendment] stands the right of a man to retreat into his own home and there be free from unreasonable governmental intrusion."); United States v. Winsor, 846 F.2d 1569, 1574 (9th Cir. 1988) ("[T]he expectation of privacy in one's home is ... most jealously guarded by the Fourth Amendment...."). Police are, whenever practicable, required to obtain a search warrant, supported by probable cause, from a neutral and detached magistrate. See, e.g., Gerstein v. Pugh, 420 U.S. 103, 112, 95 S. Ct. 854, 862, 43 L. Ed. 2d 54, 64 (1975).

Upon the arrest of an individual, in his home and when there is no search warrant, the police ordinarily may only search the area of the house within his immediate control. See Chimel v.

California, 395 U.S. 752, 89 S. Ct. 2034, 23 L. Ed. 2d 685 (1969). And there is generally "no ... justification ... for routinely searching any room other than that in which the arrest occurs...." Id. at 763, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694. Many federal and state courts have held, however, that the scope of a search incident to arrest may exceed the suspect's "wingspan" when exigent circumstances exist. See generally 2 W. LaFave, Search and Seizure §§ 6.4(b)-(c) (2d ed. 1987); 1 W. Ringel, Searches & Seizures, Arrests and Confessions §12.6(a) (1979); Joseph, The Protective Sweep Doctrine: Protecting Arresting Officers From Attack by Persons Other Than the Arrestee, 33 Cath. U.L. Rev. 95 (1983); Kelder & Statman, The Protective Sweep

Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously With an Arrest On or Near Private Premises, 30 Syracuse L. Rev. 973 (1979); Project, Seventeenth Annual Review of Criminal Procedure: United States Supreme Court and Courts of Appeals 1986-1987, 76 Geo. L.J. 521, 587-588 (1988). The burden to show the existence of exigent circumstances rests with the government. Vale v. Louisiana, 399 U.S. 30, 34, 90 S. Ct. 1969, 1972, 26 L. Ed. 2d 409, 413 (1970); Stackhouse v. State, 298 Md. 203, 217, 468 A.2d 333, 341 (1983). These exigent circumstances often are claimed in the guise of a protective sweep of the premises.³

³ Other exigent circumstances permit police to conduct warrantless
Cont'd

A protective sweep consists of a brief cursory search, in most cases, intended to secure the premises, protect the police from any persons hiding or remaining on the premises, or to find accomplices of the arrestee for whom the police also have arrest warrants. See, e.g., United States v. Caraza, 843 F.2d

searches. See, e. g., Warden v. Hayden, 387 U.S. 294, 298-299, 87 S. Ct. 1642, 1645-1646, 18 L. Ed. 2d 782, 787 (1967) ("hot pursuit" of a fleeing suspect into a dwelling); Schmerber v. California, 384 U.S. 757, 770-771, 86 S. Ct. 1826, 1831-1836, 16 L. Ed. 2d 908, 919-920 (1966) (imminent destruction of evidence); Ker v. California, 374 U.S. 23, 40-41, 83 S. Ct. 1623, 1633-1634, 10 L. Ed. 2d 726, 742 (1963) (imminent destruction of evidence in a dwelling). But see Mincey v. Arizona, 437 U.S. 385, 394, 98 S. Ct. 2408, 2414, 57 L. Ed. 2d 290, 301 (1978) (seriousness of offense under investigation does not create exigent circumstances); Vale v. Louisiana, 399 U.S. 30, 35, 90 S. Ct. 1969, 1972, 26 L. Ed. 2d 409, 414 (1970) (an arrest in front of suspect's dwelling is not an exigent circumstance that will justify a warrantless search of the dwelling).

432, 435 (11th Cir. 1988) (per curiam); United States v. Standridge, 810 F.2d 1034, 1037 (11th Cir.) (per curiam), cert. denied, ___ U.S. ___, 107 S. Ct. 2468, 95 L. Ed. 2d 877 (1987); United States v. Bernard, 757 F.2d 1439, 1443 (4th Cir. 1985); United States v. Apker, 705 F.2d 293, 306 (8th Cir. 1983), cert. denied, 466 U.S. 950, 104 S. Ct. 2151, 80 L. Ed. 2d 538 (1984), 465 U.S. 1005, 104 S. Ct. 996, 79 L. Ed. 2d 229 (1984); United States v. Gardner, 627 F.2d 906, 909-910 (9th Cir. 1980); United States v. Christophe, 470 F.2d 865, 869 (2d Cir. 1972), cert. denied, 411 U.S. 964, 93 S. Ct. 2140, 2162, 36 L. Ed. 2d 648 (1973); see generally 2 W. LaFave, supra, §§ 6.4 (b)-(c).⁴

⁴ A "protective sweep" and a "search for potential accomplices" are often
Cont'd

In United States v. Briddle, 436 F.2d 4 (8th Cir. 1970), cert. denied, 401 U.S. 921, 91 S. Ct. 910, 27 L. Ed. 2d 824 (1971), the court distinguished Chimel from those cases where a cursory search is necessary. Briddle, 436 F.2d at 8. The court noted that the police officers in Chimel, armed with an arrest warrant, were at Chimel's home, with his

classified as separate exigent circumstances which may justify warrantless intrusions. See 2 W. LaFave, Search and Seizures §§ 6.4 (b)-(c) (2d ed. 1987). Nevertheless, the rationale supporting these searches are in many cases the same -- safety and protection of law enforcement officers. See generally id. In the present case Corporal Rozar testified that he was not concerned about any danger. Nonetheless, the fact that an accomplice to an armed robbery was on the loose arguably might support the inference that safety was a concern of the arresting officers. The terms "protective sweep" and "search for potential accomplices" are indistinguishable in this case. For the sake of brevity, the term protective sweep will be used hereinafter.

wife, waiting for him to arrive home. Id. Further, Chimel "was arrested under circumstances that did not occasion the officers to conduct a cursory viewing of the house premises concurrently with the arrest as a security measure." Id. See also Payton, 445 U.S. at 589, 100 S. Ct. at 1381, 63 L. Ed. 2d at 652 (recognizing that, upon the execution of an arrest warrant, there may be a need to check the premises for safety reasons). If the police have justifiably carried out a protective sweep, any evidence or contraband in plain view may be seized. See, e.g., Bernard, 757 F.2d at 1443; see generally Arizona v. Hicks, ___ U.S. ___, ___, 107 S. Ct. 1149, 1153, 94 L. Ed. 2d 347, 354-355 (1987); Coolidge v. New Hampshire, 403 U.S. 443, 465, 91 S. Ct.

2022, 2037, 29 L. Ed. 2d 564, 582 (1971).

When we assess the seriousness of an intrusion, whether it be a protective sweep or some other type, we consider the objective expectation of privacy that may exist, as well as the governmental interest served by the intrusion. See Doering v. State, 313 Md. 384, 397, 545 A.2d 1281, 1287 (1988). Thus, when the intrusion is slight, as in the case of a brief stop and frisk on a public street, and the public interest in prevention of crime is substantial, reasonable articulable suspicion may be enough to pass constitutional muster. See Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L. Ed. 2d 889 (1968); Lee v. State, 311 Md. 642, 537 A.2d 235 (1988). See also New

Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L. Ed. 2d 720 (1985) (lower expectation of privacy in a public school); Winsor, 846 F.2d at 1575-1579 (illustrating that the Supreme Court has upheld searches, conducted on less than probable cause, only in public places which, by their nature, give rise to a lower expectation of privacy). And because the expectation of privacy in a motor vehicle is less than in a home, "the exceptions [to the warrant requirement] are more numerous." Doering at 397, 545 A.2d at 1288. See also New York v. Class, 475 U.S. 106, 106 S. Ct. 960, 89 L. Ed. 2d 81 (1986). But

[w]hen the expectation of privacy is legitimately high, only the most exigent circumstances will justify a warrantless intrusion. Thus, when the sanctity of the home is involved, the exceptions to the warrant requirement

are few.

Doering at 397, 545 A.2d at 1287-1288.

Thus, to justify a protective sweep of a home, the government must show that there is probable cause to believe that "a serious and demonstrable potentiality for danger" exists. United States v. Kolodziej, 706 F.2d 590, 596 (5th Cir. 1983) (quoting United States v. Smith, 515 F.2d 1028, 1031 (5th Cir. 1975), cert. denied, 424 U.S. 917, 96 S. Ct. 1119, 47 L. Ed. 2d 322 (1976)). See also United States v. Cravero, 545 F.2d 406, 418 (5th Cir. 1976), cert. denied, 430 U.S. 983, 97 S. Ct. 1679, 52 L. Ed. 2d 377 (1977), 429 U.S. 1100, 97 S. Ct. 1123, 51 L. Ed. 2d 549 (1977) (cursory safety check permitted if circumstances provide, at minimum, probable cause to believe a

serious threat to safety is present); and Commonwealth v. Elliott, 714 S.W.2d 494, 496 (Ky. Ct. App. 1986) (burden is on government to prove that officers had probable cause to believe there was serious threat of danger). The Supreme Court has taken the probable cause approach to the exigent circumstance of "hot pursuit."

See United States v. Santana, 427 U.S. 38, 42-43, 96 S. Ct. 2406, 2409-2410, 49 L. Ed. 2d 300, 305 (1976) (police must have probable cause to follow a suspect in "hot pursuit" into a dwelling). See also Hicks, ____ U.S. at ___, 107 S. Ct. at 1154, 94 L. Ed. 2d at 356 ("A dwelling place search ... requires probable cause....").⁵

⁵ Probable cause must be based on an objective standard because "[i]f Cont'd

We recognized the same principle when, in the context of the warrantless search of a dwelling, we observed that "exigency implies urgency, immediacy, and compelling need," Stackhouse, 298 Md. at 212, 468 A.2d at 338, and "that the exception for exigent circumstances is to be construed narrowly." Id. at 215-216, 468 A.2d at 340. See also e.g., Mincey v. Arizona, 437 U.S. 385, 393-394, 98 S. Ct. 2408, 2414, 57 L. Ed. 290, 301 (1978) (warrant required to search a home unless the exigencies are

subjective good faith alone were the test, the protections of the fourth amendment would evaporate, and the people would be "secure in their ... houses," only in the discretion of the police.'" Terry v. Ohio, 392 U.S. 1, 22, 88 S. Ct. 1868, 1880, 20 L. Ed. 2d 889, 906 (1968) [citation omitted]. See also Herod v. State, 311 Md. 288, 299, 534 A.2d 362, 367 (1987) (police officer's subjective determination that investigatory stop was justified is not controlling).

compelling).

With these principles in mind, we turn again to this case. The State insists that, on the facts of this case, a reasonable police officer would have had ample ground to believe that there was an accomplice in Buie's home and that a sweep was required to ensure the safety of the arresting party. It relies to a considerable extent on a line of cases following Guevara v. Superior Court, 7 Cal. App. 3d 531, 86 Cal. Rptr. 657 (1970). In that case, police arrested Guevara, a drug dealer, in the living room of his home. Guevara at 533, 86 Cal. Rptr. at 658. They then searched the kitchen and found drugs. Id. The California appellate court found the search a proper effort to seek possible confederates. Id. at

534-535, 86 Cal. Rptr. at 659. But the facts before the court in Guevara were far more substantial than those before the Circuit Court for Prince George's County in this case. In the California case, the police had been informed that other persons frequented Guevara's apartment and that a drug buyer from San Francisco was expected momentarily. They had specific information showing a likelihood, a real probability, that confederates would be present. In our case we have no more than the knowledge that two days previously Buie had been accompanied by an accomplice, Allen, when the robbery was committed.

A case more helpful to the State is People v. Block, 6 Cal. 3d 239, 491 P.2d 9, 98 Cal. Rptr. 657 (1971) (en banc).

There, police raided a "pot party" in a home, arresting Block and three others in the living room and two additional merry makers in the adjacent dining room. Block, 6 Cal. 3d at 241-242, 491 P.2d at 10-11, 98 Cal. Rptr. at 658-659. The stairway lights in the large house were on, and a policeman went upstairs to look for other partygoers. Id. at 242, 491 P.2d at 11, 98 Cal. Rptr. at 659. He found none, but did discover marijuana. Id. That warrantless search was upheld because there might have been other felons in the dwelling; the party was of indeterminate size, and the stairway lights were on. Id. at 245-246, 491 P.2d at 13-14, 98 Cal. Rptr. at 661-662. But in our case there was no gang of indeterminate size, no knowledge that

anyone but Buie and the young woman were in the house, and nothing like a lighted stairway to suggest that the contrary might be true. We find apt the language of another California case in which a warrantless protective sweep was struck down:

There is, of course, always the possibility that some additional person may be found in a house outside of which an arrest took place. But the mere possibility of additional persons in the house, without more, is not enough to provide probable cause to search the entire premises for additional suspects once the suspect whom the officers had sought was arrested.

Dillon v. Superior Court, 7 Cal. 3d 305, 314, 497 P.2d 505, 511, 102 Cal. Rptr. 161, 167 (1972) (en banc).

In some respects, Guevara is like United States v. Bernard, 757 F.2d 1439 (4th Cir. 1985). In that case, police,

in a helicopter, conducted a surveillance of suspected marijuana fields in West Virginia. Bernard, 757 F.2d at 1440. From the air, the police spotted three adults. Id. at 1441. The ground crew, upon their arrival on the scene, located only two adults; upon being questioned by the ground crew, one of the two adults denied that a third was present. Id. at 1442. In order to confirm their suspicion that a third person might be around, the police conducted a protective sweep of the curtilage of the farm. Id. During the course of the protective sweep, the police located marijuana in the barn. Id. The defendant's motion to suppress the evidence was denied by the district court. Id. The Fourth Circuit affirmed, noting that the police had a

reasonable fear for their safety based upon the circumstances of the case: the missing third person, the defendant's evasive response to questioning, and the nature of the growth and trade of illegal drugs. Id. at 1443. The court held that the evidence was in plain view and could be seized during the properly conducted sweep. Id. In Bernard, as in Guevara (but not in the case before us), the police had information about the presence of additional but unaccounted for accomplices. Further, in Bernard (but not here) there also were the evasive answers. See also Doering, 313 Md. at 400-401, 545 A.2d at 1289 (warrantless search of bus upheld when arrested suspects lied about presence of others in the vehicle and police did not know whether others were aboard).

Some courts, it is true, seem to require a level of suspicion (or exigency) even less than that present in Guevara or Bernard. See, e.g., United States v. Jackson, 778 F.2d 933, 936-937 (2d Cir. 1985), cert. denied, ___ U.S. ___, 107 S. Ct. 308, 93 L. Ed. 2d 282 (1986) (protective sweep allowed based on general knowledge that drug dealers are often armed and possible destruction of evidence); United States v. Marszalkowski, 669 F.2d 655, 665 (11th Cir.), cert. denied, 459 U.S. 906, 103 S. Ct. 208, 74 L. Ed. 2d 167 (1982) (the fact that drug dealers are likely to be armed and dangerous and that drugs can be easily disposed of justified protective sweep). There appears to be no clear majority position on the issue. See Jackson v. United

States, ___ U.S. ___, 107 S. Ct. 308, 308, 93 L. Ed. 2d 282, 282-283 (1986) (White, J., dissenting to denial of writ of certiorari and noting split among the federal circuits on the issue); United States v. Gardner, 627 F.2d 906, 910 n.3 (9th Cir. 1980) (same); Joseph, supra, at 119, 119 n.144; Kelder & Statman, supra, at 1006-1035, 1008 n.106. We believe, however, that the Supreme Court decisions require a high showing of exigent circumstances when the warrantless search of a home is implicated. And we believe that our cases, such as Doering and Stackhouse, as well as cases from other courts, have recognized this principle.

For example, in United States v. Hatcher, 680 F.2d 438 (6th Cir. 1982), the police arrested the defendant in his

basement. Hatcher, 680 F.2d at 442-443. Thereafter, they found cocaine during the course of a protective sweep. Id. They had, however, no evidence that the defendant was dangerous or that any other persons were on the premises at the time of the arrest. Id. at 444. The court reversed the district court's determination that the sweep was permissible because "'the subject of drugs is a dangerous one ... especially'" for law enforcement officers, and held that the sweep violated the fourth amendment. Id. See also United States v. Kinney, 638 F.2d 941, 944 (6th Cir.), cert. denied, 452 U.S. 918, 101 S. Ct. 3056, 69 L. Ed. 2d 423 (1981) (requiring that "a serious and demonstrable potential for danger exists" before a protective sweep will

be permitted).

In United States v. Gamble, 473 F.2d 1274 (7th Cir. 1973), three individuals were accused of aggravated battery and armed robbery. Gamble, 473 F.2d at 1275. Two of the defendants were immediately taken into custody by the police. Id. Thereafter, the police obtained an arrest warrant for the third defendant (Gamble). Id. at 1275 n.1. They went to Gamble's residence, knocked on the door, and identified themselves as police officers. Id. at 1275. The police received no reply but heard "rustling" noises from within. Id. They broke into the residence and found Gamble and a woman emerging from a bedroom and another woman in the kitchen. Id. The police arrested Gamble and proceeded to go into the

bedroom, presumably to check upon a baby they had noticed. Id. at 1276. There, they observed the weapon upon which Gamble's prosecution was based. Id.

The Seventh Circuit held that this protective sweep was unconstitutional. Id. at 1276-1277. The court found that the government's arguments justifying the search, including that the defendant was accused of a violent crime involving a dangerous weapon, his interest in handguns, and the feared presence of dangerous criminals were unconvincing. Id. at 1277. In particular, the court noted that Gamble's two accomplices in the crime were both safely in police custody. Id. Thus, the police were not permitted to search beyond the Chimel limits; there were no justifying exigent circumstances. Id.

Finally, we return to the Fifth Circuit's decision in United States v. Kolodziej, 706 F.2d 590 (5th Cir. 1983). The facts are quite similar to those now before us. Some half-dozen police officers, armed with a warrant, arrested Kolodziej, a drug dealer, inside the front doorway of his home. Kolodziej, 706 F.2d at 592. They then conducted a cursory "safety check" of the remainder of the dwelling -- an activity they attempted to justify because a tipster had advised them that Kolodziej was known to be armed and occasionally worked with a partner called "Barney." Id. The Fifth Circuit found the justification insufficient to show the necessary exigent circumstances:

We conclude that no circumstances are present in

this case which would have led a reasonable man to believe that his safety was endangered. The only evidence offered by the government to justify the security sweep was the testimony of one of the arresting officers that he thought there was a possibility that a man named "Barney", who worked with the defendant, might be in residence at the time of the arrest, and that Kolodziej occasionally carried a .357 magnum pistol. No evidence was presented to show how the officers had reason to believe that Barney was there, in fact had ever been there, or was dangerous. Drug dealers frequently have accomplices, but that fact alone does not justify a warrantless search. That the defendant carried a firearm is also insufficient. At the time the officers made the safety check, Kolodziej was already in custody, unarmed, handcuffed, and clearly no threat to the half-dozen agents present at the arrest.

Id. at 597.

This statement could be applied to our case almost verbatim. True it is

that the police were aware that Allen had participated with Buie in the Godfather's Pizza robbery. But it is also true that the police had no information supporting a serious and demonstrable likelihood that Allen was in the dwelling at the time of Buie's arrest or had ever been or even visited there. Indeed, the police had Buie's home under surveillance since the robbery and apparently had not spotted Allen in or about the dwelling. Nor did their pre-arrest telephone call indicate the presence there of anyone but Buie and the young woman. As to that, Detective Frolich knew only that there was a man and a girl in the house.

True, a gun had been used in the robbery. But this fact was not mentioned at the suppression hearing.

Moreover, at the time of the warrantless search, Buie was safely outside the house, handcuffed and unarmed. See also Stackhouse v. State, 298 Md. 203, 217-218, 468 A.2d 333, 341 (1983) (fact that defendant was handcuffed and outside attic where evidence was found prevented justification of search on basis of Chimel).

In summary, the facts in this case simply do not provide probable cause to support a reasonable belief that an accomplice was in Buie's home, that other confederates might have been there, or that any other serious and demonstrable potentiality for danger existed. There was insufficient showing of exigent circumstances to support a warrantless search of the home. The red running suit should have been

suppressed.⁶

JUDGMENT OF THE COURT OF
SPECIAL APPEALS REVERSED.
CASE REMANDED TO THAT COURT
WITH INSTRUCTIONS TO REVERSE
THE JUDGMENT OF THE CIRCUIT
COURT FOR PRINCE GEORGE'S
COUNTY AND REMAND TO THAT COURT
FOR A NEW TRIAL. COSTS TO BE
PAID BY PRINCE GEORGE'S COUNTY.

⁶ We decline to rule that the fourth amendment offers less protection to one in a home when a search is " cursory " as opposed to " full blown . " A search is a search. Hicks, ___ U.S. at ___, 107 S. Ct. at 1154, 94 L. Ed. 2d at 356. If the search of a home is warrantless, it ordinarily must be justified by exigent circumstances not present here.

IN THE COURT OF APPEALS OF MARYLAND

No. 161

September Term, 1987

JEROME EDWARD BUIE

v.

STATE OF MARYLAND

Murphy, C.J.
Eldridge
Cole
Rodowsky
McAuliffe
Adkins
Blackwell,

JJ.

Dissenting opinion by McAuliffe J.
in which Murphy, C.J., and
Rodowsky, J., join

Filed: November 28, 1988

McAuliffe, J., dissenting.

I cannot agree that the limited intrusion by the police into the basement of Buie's home constituted an unreasonable search in violation of the Fourth Amendment.

The majority acknowledges that a Fourth Amendment determination of reasonableness involves a balancing of the nature of the intrusion against the objectively reasonable expectation of privacy that exists under the particular circumstances. Yet, the majority insists on considering the intrusion in this case exactly as if it were a warrantless entry across the threshold of the home. It is not. The officers crossed the threshold of this home in strict compliance with the Fourth Amendment. Payton v. New York, 445 U.S.

573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980). They had a warrant for Buie's arrest for armed robbery and they had reason to believe Buie was within the home. The question in this case is not the nature of exigent circumstances required to justify the warrantless entry into a home, but rather the exigency that will justify a limited additional intrusion following a prior valid entry.

When the police team entered Buie's home armed with a valid warrant for his arrest, they fanned out to begin the search. Unquestionably, the police could have gone into the basement at that time. As the Supreme Court said in Payton v. New York, *supra*:

If there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer

that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law. Id., 445 U.S. at 602-03.

Being legitimately in the basement area, the police could have seized the red running suit, which was in plain view and which the police had probable cause to believe was evidence of a recent felony. Arizona v. Hicks, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). The distinction in the present case is that Buie came out of the basement and his arrest was completed before the police entered the basement. I do not suggest that this is a distinction without a difference. Chimel v. California, 395 U.S. 752, 89 S.Ct. 2034, 23 L.Ed.2d 685 (1969), holds that the police have no automatic right to search an entire home merely because a person

is arrested therein. Yet, the consideration of the totality of circumstances, including the extent of the right of the officers to search the entire home which existed until Buie changed the situation by surrendering at the top of the stairs, is helpful in understanding the level of expectation of privacy that the law will reasonably afford to Buie concerning items in plain view in the basement.

Moreover, Chimel addresses full-blown searches and I do not suggest that the police would have been entitled to conduct such a search of this basement. The only search that was reasonable under these circumstances was a limited search for a person or persons. This type of search is less intrusive, and may be accomplished

fairly quickly. It does not permit the opening of desks or the examination of documents.

The type of search that was conducted in this case was justified under the circumstances. Buie was arrested only after hiding in the basement. Sergeant Dunn had yelled down into the basement when the police arrived, but received no response. Corporal Rozar then twice yelled into the basement for anyone to come out before Buie finally responded. The police had probable cause to believe that the armed robbery which had occurred 48 hours earlier had been committed by two persons -- Buie and Lloyd Allen. The police had obtained arrest warrants for, and were looking for, both of them. Contrary to the

statement in the majority opinion that "to the best of [the police officers'] knowledge, Buie and an unidentified girl or woman were the only occupants of the dwelling," the police did not know how many persons were in the home. They knew that Buie and a woman were present -- they did not know how many more persons might have been present. For the police to make a quick sweep of the basement from which Buie had emerged was reasonable, whether to check for the presence of the accomplice who had so recently been involved with Buie and an armed robbery, or to protect themselves from others who might have been hiding with Buie. The Court of Special Appeals properly considered the extent of Buie's privacy interests, the limited nature of the intrusion, and the exigencies of the

situation in concluding that the search was reasonable. Buie v. State, 72 Md.App. 562, 570-76, 531 A.2d 1290 (1987). I would affirm.

Chief Judge Murphy and Judge Rodowsky have authorized me to say that they join in this dissenting opinion.

REPORTED
IN THE COURT OF SPECIAL APPEALS
OF MARYLAND

No. 100

September Term, 1987

JEROME EDWARD BUIE

v.

STATE OF MARYLAND

Wilner,
Alpert,
Bloom,

JJ.

Opinion by Bloom, J.

Filed: October 9, 1987

A jury in the Circuit Court for Prince George's County, presided over by Judge Jacob S. Levin, convicted appellant, Jerome Edward Buie, of robbery with a deadly weapon and the use of a handgun in the commission of a felony. Judge Levin sentenced appellant to consecutive sentences of twenty years for the robbery with a deadly weapon and fifteen years for the use of a handgun.

In this appeal from those judgments, appellant asserts that the trial court erred when it denied his motion to suppress evidence seized at the time of his arrest. He also contends that the trial court erred when it called his cousin, Antonio Buie, as its witness. We disagree with appellant's assertions of error and will affirm the judgments.

I Motion to Suppress

Evidence produced at the pre-trial hearing on appellant's motion to suppress disclosed that on 5 February 1980 seven police officers arrived at appellant's home with a valid warrant for his arrest. The police also had a warrant for the arrest of Lloyd Allan. Based on eyewitness identifications, both suspects were charged with the robbery of a pizza shop, which had taken place two days earlier.

While two of the officers remained outside to secure the exits, the other five entered appellant's home. Corporal Rozar, one of those five, stood at the entrance to a flight of stairs leading down to a basement. Corporal Rozar called down the stairs several times, identifying himself and commanding

everyone in the basement to come out with hands raised. Eventually appellant emerged from the basement and was promptly arrested, handcuffed, and searched. After appellant's arrest, Detective Frolich went into the basement where he saw, in plain view, a red jogging suit. He seized the jogging suit because it matched a description of the clothing worn by the armed robber at the scene of the crime for which appellant was arrested.

Cross-examining Detective Frolich at the suppression hearing, defense counsel elicited the following with respect to the officer's entry into the basement:

Q. You observed the officer search [appellant]?

A. Yes, sir.

Q. And did he find anything

on him?

A. I don't recall.

Q. And you observed the officer handcuff [appellant]?

A. Yes, sir.

Q. And then place him under arrest?

A. Yes, sir.

Q. What did the officer do with [appellant] at that point?

A. I don't know.

Q. Took him out, whatever. At this point, you decided to go into the basement?

A. Yes, sir.

Q. Did you know what you were looking for?

A. I just went down there in case there was someone around.

. . .

Q. Did you have any reason to believe that anyone else was in the house besides Mr. Buie?

A. I had no idea who lived there

. . .

Q. But, was there any particular knowledge that allowed you to know that [appellant] was at home at that time?

A. Yes, sir.

Q. What was that?

A. I had a secretary in my office call his residence and ask to speak to him.

Q. And who answered the phone?

A. I don't know who answered the phone. But, I think it was female and then she had a conversation with Mr. Buie.

Q. So you knew there was a girl and a man in the house?

A. Yes, sir.

At the close of the suppression hearing, Judge Levin overruled appellant's motion

to suppress, stating that Detective Frolich's search of the basement was reasonable to insure the officers' safety because appellant was charged with a serious offense involving a handgun and because the police did not know who else was in the basement following appellant's arrest.

During the course of trial, before offering the jogging suit in evidence, the State's Attorney asked the trial judge to reopen the suppression hearing in order to clarify the facts and circumstances surrounding the basement search. The trial judge reopened the suppression hearing over appellant's objection. The jury left the courtroom and Detective Frolich once again took the stand. Detective Frolich reiterated that warrants were sworn out for both

appellant and his suspected accomplice and stated, for the first time, that the officers who arrived at appellant's home on 5 February 1986 were armed with both warrants. Further questioning of Detective Frolich produced the following:

Q. Now, at the time you arrested [appellant], had an arrest of [appellant's accomplice] been made?

A. No, sir.

Q. And did you have any knowledge or information concerning how [appellant] and [the accomplice] were related as far as - in any fashion?

. . .

A. They had been arrested prior, in November, for an armed robbery.

. . .

Q. Did you know whether

they knew each other any way?

A. I had information, or the information from the other robbery, that they were running together.

Q. Okay. And at the time you went down to the basement, why did you go there?

A. To see if [appellant's accomplice] may be in the basement.

A. Okay. At that point, you didn't know whether [appellant's accomplice] would be there or not?

A. No, sir.

Judge Levin found no cause to change his previous ruling based on the second hearing, and again overruled the motion to suppress. Appellant challenges Judge Levin's reopening of the hearing as well as the denial of the motion to suppress.

We note, initially, that the State

bears the burden of proving circumstances which justify a warrantless search. Stackhouse v. State, 298 Md. 203, 220 (1983) (citing Coolidge v. New Hampshire, 403 U.S. 443, 455, 91 S. Ct. 2022, 2032, 29 L. Ed. 2d 564, 576 (1971); United States v. Teffers, 342 U.S. 48, 51, 72 S. Ct. 93, 95, 96 L. Ed. 59, 64 (1951); McDonald v. United States, 335 U.S. 451, 456, 69 S. Ct. 191, 193, 93 L. Ed. 153, 158 (1948). Furthermore, "in determining the lawfulness of the search we may concern ourselves only with what the police officers believed at the time." Stackhouse, supra, at 220 (citing Ker v. California, 374 U.S. at 40 n.12, 83 S. Ct. at 1633 n.12, 10 L. Ed. 2d at 742 n.12 (1963); Johnson v. United States, 333 U.S. 10, 17, 68 S. Ct. 367, 370,

92 L. Ed. 436, 442 (1948) [footnote omitted]).

The decision at a pre-trial suppression hearing is binding at the trial unless the trial judge, in his discretion, grants a hearing de novo on the motion, Hall v. State, 15 Md. App. 363, 370 (1972); Md. Rule 4-252(g)(2), in which event our review is limited to the de novo ruling. Bartram v. State, 33 Md. App. 115, 140 (1976).

We agree with appellant's contention that the trial judge had no authority to reopen the suppression hearing at the State's request. Maryland Rule 4-252(g)(2) states that "[i]f the court denies a motion to suppress evidence, the ruling is binding at the trial unless the court, in its discretion, grants a de novo hearing on

a renewal of the motion." Here, there was no renewal of the motion, and the trial judge did not grant a de novo hearing. He merely reopened the suppression hearing to allow the State to reinforce the testimony of one witness. That is not within the contemplation of the Rule.

With regard to violations of the Maryland Rules of criminal procedure, the Court of Appeals stated in Noble v. State, 293 Md. 549, 557-58 (1982):

This Court has firmly adhered to the principle that the rules of [criminal] procedure are precise rubrics to be strictly followed, and we shall continue to do so. A violation of one of these rules constitutes error, normally requiring such curative action or sanction as may be appropriate.

. . .

It does not follow, however, that the harmless error

doctrine has no application to the Maryland Rules and that a violation of a procedural rule can never be harmless....

. . .

If the standard for harmless error is met, a violation of a procedural rule will not ordinarily result in a reversal of a conviction.

The test for harmless error in criminal cases was set forth in Dorsey v. State, 276 Md. 638, 659 (1976), as follows:

[W]hen an appellant, in a criminal case, establishes error, unless a reviewing court, upon its own independent review of the record, is able to declare a belief, beyond a reasonable doubt, that the error in no way influenced the verdict, such error cannot be deemed "harmless" and a reversal is mandated.

The error in reopening the suppression hearing had no influence on the trial proceedings and certainly not

on the jury's verdict. The trial judge did not alter the earlier ruling on admissibility of the seized evidence as a result of the later testimony. The motion to suppress was denied on the basis of the pre-trial hearing. We believe that the court's initial ruling was correct; therefore the later testimony had no significance and any error in receiving it was harmless beyond a reasonable doubt.

In Chimel v. California, 395 U.S. 752, 23 L. Ed. 2d 685, 89 S. Ct. 2034 (1969), the United States Supreme Court held that, incident to a lawful arrest, police officers may search the arrestee's person and areas "'within his immediate control' - construing that phrase to mean the area from within which he might gain possession of a

weapon or destructible evidence." Id. at 763, 23 L. Ed. 2d at 694. The Court held that all other searches conducted contemporaneous to an arrest must be made pursuant to a warrant or must fall within one of the "well-recognized exceptions" to the warrant requirements. Id. at 763, 23 L. Ed. 2d at 694.

Following Chimel, the Court of Appeals of Maryland, in Stackhouse, supra, held that incident to a lawful arrest any contemporaneous search beyond the arrestee's "wingspan" must be made pursuant to a warrant or to an exception to the warrant requirement.

There is some similarity between the facts of Stackhouse and the facts of this case. In each case police officers entered appellant's home to execute an

arrest warrant and, after making the arrest, "searched" the arrestee's hiding place.

The similarities between these two cases end when the reasons for the post arrest searches are compared. In Stackhouse, policemen searched the arrestee's hiding place for evidence that might be destroyed but were unaware of any facts to indicate that the destruction of evidence was imminent or even likely. In this case, a police officer who had knowledge that a warrant had been sworn out for the arrest of an accomplice went into the basement of appellant's house where appellant had been hiding, to see if there was anyone else hiding there.

In its analysis of the legality of the search in Stackhouse, the Court

noted that "[i]n holding that the police may search the area within the arrestee's reach incident to a lawful arrest, the Supreme Court in Chimel acknowledged in dicta that exigent circumstances provided a second recognized justification for a warrantless search or seizure incident to arrest. 395 U.S. at 763, 89 S. Ct. at 2040, 23 L. Ed. 2d at 694." Id. at 338. The Stackhouse Court, however, defined "exigency" narrowly: "The meaning of exigent circumstances is that the police are confronted with an emergency - circumstances so imminent that they present an urgent and compelling need for police action." Id. at 342. The Court stated: "upholding warrantless searches based upon exigent circumstances involves two principal

categories of cases: 'hot pursuit,' and destruction or removal of evidence." Id. at 338.

The Court concluded in Stackhouse that the post-arrest search of Stackhouse's hiding place violated the Fourth Amendment guarantee against unreasonable searches and seizures because the State failed to demonstrate exigent circumstances justifying the search. The Court stated: "Where a warrantless search is based upon the destruction or removal of evidence surrounding circumstances must present a specific threat to known evidence." Id. at 339. The facts in Stackhouse failed to present such a threat.

In the case sub judice, the State does not argue that Detective Frolich's post-arrest search of appellant's

basement took place under exigent circumstances. Detective Frolich was not in a "hot pursuit" situation; he had no reason to fear the imminent destruction of evidence. Nevertheless, the absence of those two circumstances does not mean that the invasion of the basement was unreasonable.

Although Detective Frolich did not expressly so state, it is certainly inferable from his testimony at the pre-trial suppression hearing that he went into appellant's basement to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene. He knew two arrest warrants had been issued in connection with the armed robbery of the pizza shop; he stated on cross-examination that he went downstairs not to search

for evidence but to see if someone else was there. Who would he be looking for other than the known accomplice or someone else who might pose a danger to him and his fellow officers?

Although Maryland has not previously determined whether, following the execution of an arrest warrant, officers may make a cursory inspection of the premises where the arrest took place to search for other known suspects, other states have ruled in the affirmative on this issue.

In Guavara v. Superior Court, 7 Cal. App. 3d 533, 86 Cal. Rptr. 657 (1970), police officers arrested the accused at his apartment on drug charges after being informed that a drug transaction was taking place there. Following their arrest of the accused,

police walked through the apartment to search for other parties to the transaction. The California appellate court held that the walk-through search was reasonable. The court wrote, "It is clear that the officers had information which it was their right, and their duty, to follow up. Having arrested defendant, it was not unreasonable for them to walk through the house to see if others were there...." Id. at 535, 86 Cal. Rptr. at 659. The court stated that such a sweep through the house was not unreasonably excessive, but constituted "basic police investigation of information received." Id. at 535, 86 Cal. Rptr. at 659.

In Jones v. State, 565 S.W.2d 934 (Tex. Crim. 1978), police officers suspected five men of robbing a

department store. After arresting three of the suspects, they arrested the fourth one in his home, and afterwards walked through the home to search for the fifth suspect. The Court of Criminal Appeals of Texas upheld the search because:

The officers knew that appellant was only the fourth of five robbers who had been arrested and they were fully justified for their own protection to go into the hall and look into the open doorways of the bedrooms to see if the fifth robber, or someone else, was there who might cause them harm.

Id. at 937.

In People v. Mack, 27 Cal. 3d 145, 165 Cal. Rptr. 113, 611 P.2d 454 (1980), police officers were informed that property stolen by five named suspects could be found in the garage at the home of one of the suspects. When officers

approached that suspect's home with the intention of questioning him, they were spotted by two men leaving the garage. The two men reentered the garage and the officers heard shouting and the sound of furniture moving. The officers ordered the occupants out of the garage. Five men emerged, and an officer entered the garage to search for additional suspects. The Court held that the officer "acted properly in entering the garage to search for additional suspects. He did so out of justification for his own safety... he did not know whether the five men who had come out of the garage included all five of the accused burglars." Id. at 151, 165 Cal. Rptr. at 116, 611 P.2d at 457.

The rationale for post-arrest sweep

searches for suspects hinges on the police officer's reasonable belief that other suspects are at large; however, the arresting officer need not have probable cause to believe that the other suspects are present. Professor La Fave, in analyzing Guavara, stated:

It is important to note that the Guavara Court did not say that the police had reasonable grounds to believe that another offender was on the premises and that the entry into the kitchen was nothing more than a pre-arrest search for this person. Rather, the court's holding appears to be based on the proposition that once the police have lawfully entered the premises and made an arrest therein, something less than the usual quantum of probable cause is needed to justify a limited additional intrusion to investigate the possibility that other offenders are present.

2 W. R. La Fave, Search and Seizure, § 6.4(b) at 642 (2d ed. 1987). (Emphasis

in original.) (Footnotes omitted.) The Guavara rule is limited to those situations where the police have information that accomplices of an arrestee are at large. It has its natural stopping point where no accomplices are suspected or where all known accomplices have been apprehended previously.

Appellant relies on the recent case of Arizona v. Hicks, 480 U.S. ___, 108 S. Ct. ___, 94 L. Ed. 2d 347 (1987), in support of his contention that the search of his basement and seizure of his jumpsuit were unlawful. His reliance is misplaced.

In Hicks, police lawfully entered the accused's apartment without a warrant pursuant to an exigent circumstance: a bullet had been fired

through the floor of Hicks's apartment, striking and injuring a man in the apartment below. Police searched Hicks's apartment for the shooter, for victims, and for weapons. The police found and seized weapons and a stocking-cap mask. One officer then spotted two expensive stereos which seemed out of place in Hicks's otherwise squalid apartment. Acting on a "reasonable suspicion," the officer lifted the stereos and noted their serial numbers. When he contacted headquarters and reported his observations and findings, the officer was informed that the serial number on the stereos in Hicks's apartment corresponded to the numbers of stereos recently stolen. The stereos were then seized.

The Supreme Court held that the

search and seizure of the stereos were illegal because they were not supported by probable cause. Even if police officers are lawfully in a home, the search and seizure of items in plain view must be supported by probable cause.

It is appellant's contention that the basement search in the case sub judice, not being supported by probable cause, is illegal under Hicks because, although the officers knew that appellant's accomplice was at large, they did not have probable cause to believe that the accomplice was in the basement. We think appellant misinterprets Hicks.

Hicks holds that searches and seizures of items found pursuant to the plain view doctrine must be supported by

probable cause to believe that they are subject to seizure as contraband or evidence or fruits of crime. The plain view doctrine presupposes the legality of the officer's presence on the premises. In the case sub judice the issue is the legality of the officer's presence in the basement, there being no contention that the officer had no probable cause to seize the red jogging suit which was in plain view once he entered the basement. Hicks, therefore, is inapposite.

Appellant also cites Dillon v. Superior Court of Santa Barbara County, 102 Cal. Rptr. 161, 497 P.2d 505 (1972). In Dillon, police observed marijuana growing in appellant's backyard. The officer arrested appellant in the backyard, then entered

her home to search for others suspected of growing the plants. The search was held to be unlawful because the police had no probable cause to believe other suspects were in the house at the time of the arrest. There is, nevertheless, some dicta in Dillon to the effect that even if the arrest had taken place inside the home the subsequent search for suspects would have violated the Fourth Amendment for lack of probable cause. It was pointed out in a dissent, however, that no probable cause was required in Guavara.

We believe that Guavara and the cases following Guavara are based on sound reason and logic. The Fourth Amendment prohibits unreasonable searches and seizures. Traditionally, the sanctity of a person's home - his

castle - requires that the police may not invade it without a warrant except under the most exigent of circumstances. But once the police are lawfully within the home, their conduct is measured by a standard of reasonableness. They may not use the arrest of the suspect within his home as a pretext to search his house for evidence (Chimel), unless exigent circumstances make such a warrantless search reasonable (Stackhouse); nor may they even search and seize items in plain view unless there is probable cause to believe those items are subject to seizure (Hicks). But as Professor La Fave pointed out, supra, if there is reason to believe that the arrestee had accomplices who are still at large, something less than probable cause --

reasonable suspicion -- should be sufficient to justify a limited additional intrusion to investigate the possibility of their presence.

We hold, therefore, that the court did not err in denying appellant's motion to suppress.

II Calling Appellant's Cousin as the Court's Witness

Under Maryland law, the decision to call an individual to the stand as the court's witness lies within the sound discretion of the court and will not be overturned absent an abuse of discretion. Scarborough v. State, 50 Md. App. 276, 282 (1981), citing Patterson v. State, 275 Md. 563 (1975). The trial judge should consider the following facts when determining whether to call a court's witness:

(1) the prosecutor's inability to vouch for the veracity or integrity of the witness; (2) the close relationship between the witness and the defendant; (3) the existence of contradictory or inconsistent statements by the witness; (4) the hostility of the witness; and (5) the necessity for the testimony, i.e., where the witness possesses material evidence.

Scarborough v. State, supra, at 292.

Nevertheless, it has been recognized that a "trial judge should call a witness as a 'court witness' only when the adversary system fails to produce the necessary facts and a miscarriage of justice would likely result." Patterson, supra, at 577. Also, as the Court of Appeals has noted, when "...a witness becomes the court's 'own witness' the judge must be scrupulously careful to preserve an attitude of impartiality and should never give the

jury the impression he is of the opinion that the defendant is guilty." Patterson, supra, at 578 (citations omitted).

In the case sub judice, the court called Antonio Buie as a court's witness at the request of the State. The State could not vouch for Antonio Buie's veracity because he had given conflicting stories to the police and because he would not tell the State what his testimony under oath would be. The witness was closely related to appellant; he was appellant's cousin and was living with appellant on the day of the robbery.

The witness was clearly hostile; he had ignored the State's subpoena and was brought to court pursuant to a body attachment. Antonio Buie's testimony

was material and important, although not crucial, to the State's case; he was one of two eyewitnesses to the armed robbery. Since Antonio Buie met all five of the criteria listed in Patterson, the trial court clearly did not abuse its discretion in calling him as its own witness.

Appellant further complains that the trial judge, after calling Antonio Buie to the stand, never examined him. Instead, the State and appellant's attorney each cross-examined appellant in turn. Appellant argues that the court's failure to examine its own witness deceived the jury into believing that Antonio Buie was the State's witness and in fact made Buie the State's witness, thus rendering the State's impeachment of him improper.

We do not agree. The trial judge clearly stated that he was calling Antonio Buie as the court's witness "in the interest of justice." It was clear that Antonio Buie was the court's witness, not the State's. Nor do we find fault with the trial judge's failure to examine the witness. The Court of Appeals has stated that when questioning a witness "the court should be careful to preserve an attitude of impartiality and against giving the jury an impression that the court was of the opinion that the defendant was guilty." Patterson, supra, at 579 (quoting Gomila v. United States, 146 F.2d 372, 374 (5th Cir. 1944)). By declining to examine its own witness, the court avoided any appearance of partiality. There was no error.

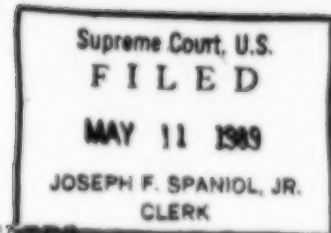
JUDGMENTS AFFIRMED.

COSTS TO BE PAID BY
APPELLANT.

OPPOSITION

BRIEF

JUN 1 PAGE 1



IN THE
SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1988

No. 88-1369

STATE OF MARYLAND,

Petitioner

v.

JEROME EDWARD BUIE,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

MOTION FOR LEAVE TO PROCEED
IN FORMA PAUPERIS

The Respondent, Jerome Edward Buie, who is indigent and who has been found to meet the qualifications for representation by the Office of the Public Defender for the State of Maryland, asks leave to file the attached Brief in Opposition to the State of Maryland's Petition for Writ of Certiorari to the Court of Appeals of Maryland without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46.

23/94

The Petitioner's Affidavit in support of this
Petition is attached hereto.

John L. Kopolow
John L. Kopolow
Assistant Public Defender
Appellate Division
201 Saint Paul Place
Baltimore, Maryland 21202
(301) 333-2751

Counsel for Respondent

IN THE
SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1988

No. 88-1369

STATE OF MARYLAND,

Petitioner

v.

JEROME EDWARD BUIE,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

AFFIDAVIT IN SUPPORT OF MOTION TO PROCEED
ON APPEAL IN FORMA PAUPERIS

I, Jerome Edward Buie, being first duly sworn,
depose and say that I am the Respondent in the above-enti-
tled case; that because of my poverty I am unable to pay the
costs of said proceeding, and that I believe I am entitled
to respond to the State of Maryland's Petition.

I further swear that the responses which I have
made to the questions and instructions below relating to my
ability to pay the cost of litigating the appeal are true.

1. Are you presently employed? No

(a) If the answer is yes, state the amount of your salary or wages per month and give the name and address of your employer.

(b) If the answer is no, state the date of your last employment and the amount of the salary and wages per month which you received.

July 14, 1986 10.00 Hour for
William Johnson
Paint Company

2. Have you received within the past twelve months any income from a business, profession or other form of self-employment, or in the form of rent payments, interest, dividends, or other source? No

(a) If the answer is yes, describe each source of income and state the amount received from each during the past twelve months.

3. Do you own any cash or checking or savings accounts? No

(a) If the answer is yes, state the total value of the items owned.

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothing)? No

(a) If the answer is yes, describe the property and state its approximate value.

5. List the persons who are dependent upon you for support and state your relationship to those persons. None

I understand that a false statement or answer to my question in this affidavit will subject me to penalties for perjury.

Jerome Buie
Jerome Edward Buie

Subscribed and sworn to before me, a Notary Public
this 9th day of May, 1989.

Carol A. Simon
NOTARY PUBLIC
My Commission Expires: May 1991

Let the applicant proceed without prepayment of costs or fees or the necessity of giving security therefore.

JUSTICE

IN THE
SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1988

No. 88-1369

STATE OF MARYLAND,

Petitioner

v.

JEROME EDWARD BUIE,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Has the Fourth Amendment been violated where police, after arresting a suspect on the main floor of his house, enter and search his basement for the most general of reasons -- to wit, "in case there was someone else in the basement" and "to look around" -- and with no basis for believing anyone else was in the basement?

IN THE
SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM, 1988

No. 88-1369

STATE OF MARYLAND,

Petitioner

v.

JEROME EDWARD BUIE,

Respondent

BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF CERTIORARI

The Respondent, by his attorney, John L. Kopolow, Assistant Public Defender, requests that the petition for writ of certiorari be denied.

STATEMENT OF THE CASE

The following facts and quotations from the record elucidate the summary of facts as set forth in the petition for writ of certiorari.

Prince George's County Police Corporal James Rozar testified that Respondent's house had been under police surveillance "for about three days" when they decided to

enter the house to execute the warrant for his arrest. (E.3).¹ Shortly before entering, Detective Joseph Frolich obtained "particular knowledge" that Respondent would be inside. (E.15). He explained (E.16):

A I had a secretary in my office call his residence and ask to speak to him.

Q And who answered the phone?

A I don't know who answered the phone. But, I think it was a female and then she had a conversation with Mr. Buie.

Q So you knew there was a girl and a man there in the house?

A Yes, sir.

Frolich saw "two young girls" sitting in front of the house as he approached. (E.15).

Inside the house Rozar took responsibility for securing the basement. (E.3). After yelling twice for anyone down there to come out, he heard a voice ask, "who is it?" (E.4). He said three times, "this is the police." As instructed, Respondent showed Rozar his hands and then ascended the stairs. Rozar placed him against the wall, searched and handcuffed him. (E.4). He saw no need to search the area around Respondent. To the question: "You weren't worried about there being any danger or anything like that?", Rozar replied, "No." (E.6).

Detective Frolich explained his observations, actions, and motivations as follows (E.11-14):

¹References to the record are explained at Pet. 4, n.1.

Q Detective Frolich, did, at any time, you have a search warrant to search that premises?

A No, sir.

Q No warrant was ever requested?

A No, sir.

Q You say the arrest warrant was issued on the 3rd of February?^[2]

A Yes, sir.

* * * *

Detective, when you were at the house, there were approximately five or six other officers there as well?

A Yes, sir.

Q Did any of them have that warrant with them at the time?

A I had this warrant with me.

Q You had the warrant with you?

A Yes, sir.

Q And when did you first see Officer Rozar arresting Mr. Buie? Where had you been and how did you happen to come there?

A I was standing next to him when he called into the basement and, Mr. Buie came up out of the basement.

Q So you hadn't gone upstairs or hadn't searched any other part of the residence?

A No, sir.

Q What had you been doing since you had been there?

A We had just -- Officer Rozar and myself had arrived at the same time and had just entered the residence.

Q You arrived in separate cars and went in together?

A Yes, sir.

Q And you heard him say that he was going to freeze the basement, as they say? I believe that is the words that he said or, secure the basement?

A Yes, sir.

Q And you were also there when Mr. Buie showed Officer Rozar his hands, from the bottom of the steps, as requested to do?

A I couldn't see that.

Q Do you remember the officer requesting that he show him his hands?

A I don't recall.

Q But, in any event, Mr. Buie came out and came up the steps?

A Yes, sir.

Q Now, this stairway leads downstairs from a hallway on the main floor of the house?

A Yes, sir.

Q All right. Mr. Buie came up out of there and then was put against the wall in the hallway?

A Yes, sir.

Q Was anything else in the hallway, any furniture or anything of that nature?

A There could have been.

Q You observed the officer search Mr. Buie?

A Yes, sir.

²The Godfather's Pizza restaurant was robbed at noon on February 3, 1986. The police entered Respondent's home at about 3:00 p.m. on February 5, 1986. (E.5).

Q And did he find anything on him?

A I don't recall.

Q And you observed the officer handcuff Mr. Buie?

A Yes, sir.

Q And then place him under arrest?

A Yes, sir.

Q What did the officer do with Mr. Buie at that point?

A I don't know

Q Took him out, whatever. At this point, you decided to go into the basement?

A Yes, sir.

Q Did you know what you were looking for?

A I just went down there in case there was someone else in the basement.

Q You just went down there to see if someone else was down there, to look around?

A Yes, sir.

Attempting to justify the plain view seizure of the running suit, the prosecutor argued that the police went "down there to look around the basement to make sure that no one else is there, for their own protection, to check it out and then in plain view they don't open any drawers, they don't hide anything, they just see evidence that they know is part of the crime." (E.19) The trial judge ruled (E.29):

I think they had a right to search him and I think they had a right to seize, based on the facts of this case. The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a warrant, that wouldn't have been there.

Accordingly, the Motion to Suppress is denied.³

Respondent appealed to the Court of Special Appeals of Maryland arguing that Detective Frolich had no right under the Fourth Amendment to enter his basement after his arrest. In its reply the State discarded its "protective sweep" rationale:

The question presented here is whether, when police arrest a suspect inside a residence, officers may make a cursory check of the premises to determine if possible accomplices of the arrestee are present.

Court of Special Appeals of Maryland, No. 100, September Term, 1987, Brief of Appellee 2. That Court upheld the search. Buie v. State, 72 Md. App. 562, 531 A.2d 1290 (1987), reproduced in Petitioner's Appendix (Apx. 46-81).

³At midtrial the State was permitted to reopen the suppression hearing in order to clarify Detective Frolich's actions. He proceeded to testify that he entered the basement looking specifically for Respondent's accomplice. The reopening of the hearing violated the Maryland Rules of Procedure. Consequently, in the Maryland Court of Appeals and in the petition filed in this Court the State abandoned all reliance upon the testimony presented at the supplemental hearing. Pet. Apx. 7-8, 52-58.

Respondent petitioned the Court of Appeals of Maryland for a writ of certiorari. In its Answer to Petition for Writ of Certiorari the State again framed the Question Presented in terms of an officer's right "to make a cursory check of the premises for the limited purpose of determining whether the arrestee's accomplice is present[.]" Court of Appeals of Maryland, No. 161, September Term, 1987, Answer to Petition for Writ of Certiorari 1. After the Court of Appeals of Maryland granted the writ, the State in separate sections of its brief asserted that Detective Frolich went into Respondent's basement to make either a "Search for Accomplices," Court of Appeals of Maryland, No. 161, September Term, 1987, Brief of Appellee 6-11, or a "Protective Search," Id. at 11-19.

REASONS FOR DENYING THE WRIT

The State of Maryland ascribes any of three motives to Detective Frolich's entry and search of Appellant's basement: officer safety, preservation of evidence,⁴ and

⁴Prior to the filing of its petition the State did not attempt to argue that its officers acted out of a desire to preserve evidence. In the Maryland appellate courts the State dismissed as inapplicable Stackhouse v. State, 298 Md. 203, 468 A.2d 333 (1983), wherein the Court of Appeals rejected a claim that the presence of the defendant's sister created an exigency that threatened destruction or removal of evidence. Id. at 218-21. The State's position was that the Stackhouse analysis did not pertain to this case because here the officer's concern was suspects, not evidence. Court of Special Appeals of Maryland, No. 100, September Term, 1987, Brief of Appellee 6-7; Court of Appeals of Maryland, No. 161, September Term, 1987, Brief of Appellee 16, n. 7. In addition, the State did not contest the Court of Special Appeals' finding that Detective Frolich "had no reason to fear the imminent destruction of evidence." Pet. Apx. 64. Having failed to raise this particular factual

apprehension of Respondent's alleged accomplice. Pet. 11-13. It asks the Court to use this case to resolve a conflict among federal circuit courts as to the degree of justification needed to legitimize a dwelling house search undertaken for any of these purposes. Its review of the cases finds that some courts require exigent circumstances and probable cause, others require a reasonable, articulable belief, and one takes a totality-of-the-circumstances approach. Pet. 13-16.

This case is not an effective vehicle for determining the general validity of such residential searches or resolving the apparent conflict over the standard of proof because the record does not demonstrate that Detective Frolich acted on any of the rationales now being proposed by the State. He never articulated even one of them. He said only that he conducted the search "in case there was someone else in the basement" and "to look around." (E.14).

The vagueness of the detective's reasons has left the State groping for a theory that would support the search. Its initial claim that police protection was the objective was abandoned in favor of a search-for-accomplice rationale. The State now takes a multiple choice approach and, in effect, asks this Court to make a selection that

contention in the courts below, having indeed made contrary assertions, and having acquiesced in the Court of Special Appeals' contrary finding, the State has lost its right to raise it before this Court. Steagald v. United States, 451 U.S. 204, 209 (1981).

will sustain the search and seizure. Review by this Court is hardly appropriate where the record of the case is so deficient that the Petitioner must rely on the Court to find a legitimate basis for its officer's actions.

In addition, because the justifications offered by Detective Frolich were virtually all-inclusive, his testimony was consistent with patently impermissible objectives, e.g., finding evidence of the robbery or other crimes, or finding any criminal suspects who happen to have been in Respondent's company. But "the scope of [a] search must be 'strictly tied to and justified by' the circumstances which rendered its initiation permissible." Chimel v. California, 394 U.S. 752, 762 (1969), quoting Terry v. Ohio, 392 U.S. 1, 19 (1968). Also see New York v. Belton, 453 U.S. 454, 457 (1981). Under "the basic rule of Fourth Amendment jurisprudence," that warrantless searches are per se unreasonable unless shown to come within a specifically established and well-delineated exception, United States v. Ross, 456 U.S. 798, 824-25 (1982), the State was obliged to negate the constitutionally impermissible possibilities with concrete evidence rather than appellate supposition.

Even if Detective Frolich had articulated one of the justifications now proposed, the entry of the basement would not have been reasonable under any of the standards adopted by the federal circuit courts. Under the least stringent Fourth Amendment standard, he was obliged to "point to specific and articulable facts which, taken with

rational inferences from those facts, reasonably warrant[ed] that intrusion." Terry v. Ohio, supra, at 21 (footnote omitted).⁵ To justify action based upon a fear for their safety or a concern about the loss of evidence, the police had to have some reason to believe that someone remained in the basement who posed a threat to themselves or to evidence. But despite a three-day surveillance of the house, they were unable to say that anyone other than Respondent and a girl (who was apparently outside the house when the police entered) were present. Once inside, the officers did not hear or see anything to indicate that Respondent had company in the basement. It must be concluded that Detective Frolich was acting on nothing more than the mere possibility that another individual was in the house. That possibility exists in every case.

There is no need for this Court to clarify the circumstances that permit police to search a residence whether to insure their safety, prevent the loss of evidence, or apprehend an accomplice. In Payton v. New York, 445 U.S. 573, 589 (1980), the Court recognized that police may need to check premises for safety reasons. If "[a]

⁵The totality-of-the-circumstances test supposedly adopted by the Fourth Circuit in United States v. Baker, 577 F.2d 1147, cert. denied, 439 U.S. 850 (1978), Pet. 13-14, is, at bottom, the Terry standard. The officers who made a "protective sweep" of a residence in that case testified that they were afraid that there might be an armed accomplice in the house and provided the court with the specific information on which their fear was based. The appellate court agreed that they had a reasonable fear justifying the sweep. Id. at 1152.

search is a search, even if it happens to disclose nothing but the bottom of a turntable," Arizona v. Hicks, 480 U.S. 321, 325 (1987), then surely the entry of a room, which exposes far more to the officer, qualifies as a Fourth Amendment search as well. But all searches inside a home without a warrant are presumptively unreasonable absent exigent circumstances. United States v. Karo, 468 U.S. 705, 714-15 (1984). Thus, if the State sought to justify a protective search, its burden was quite clear: it had to demonstrate an exigency amounting to a serious threat of imminent danger.⁶

The State's two "law enforcement" rationales are also covered by existing case law. With respect to preservation of evidence (a claim itself not preserved, see n.4, supra), an exigency exists when police reasonably believe the destruction of known evidence is in progress, Vale v. Louisiana, 399 U.S. 30, 35 (1970), or imminent, Ker v. California, 374 U.S. 23, 40 (1963). As in Mincey v. Arizona, 437 U.S. 385, 394 (1978), there was in this case "no indication that evidence would be lost, destroyed or removed during the time required to obtain a search warrant." As

⁶Detective Frolich entered the basement after observing Corporal Rozar complete the arrest of Respondent on the main level. (E.13-14). In these circumstances the officers could have insured their safety by removing Respondent from the premises immediately. State v. Ranker, 343 So.2d 189, 195 (La. 1977). Frolich did not dispute that this may have been precisely what Rozar did. (E.14). Also, he did not testify that he entered the basement with a weapon drawn. The record, in short, tends to refute police protection as the motivation for the search

for the search for the accomplice, it is established that a desire to execute an outstanding arrest warrant for one individual does not in itself justify the warrantless search of another's house. Steagald v. United States, 451 U.S. 204 (1981). If the police actually believed Respondent's accomplice was in his house and did not wish to obtain a warrant to search it, they could simply have waited for the accomplice to leave the house. Id. at 221, n.14. In advancing its law enforcement rationales, the State has apparently forgotten that

the mere fact that law enforcement may be made more efficient can never by itself justify disregard of the Fourth Amendment. The investigation of crime would always be simplified if warrants were unnecessary. But the Fourth Amendment reflects the view of those who wrote the Bill of Rights that the privacy of a person's home and property may not be totally sacrificed in the name of maximum simplicity in enforcement of the criminal law.

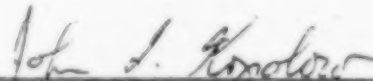
Mincey v. Arizona, supra, at 393 (citations omitted).

CONCLUSION

The State's problem is that its proof completely lacks essential components. Of the three reasons now asserted for Detective Frolich's action, the State proved none. Moreover, each justification required at least a reasonable basis for believing that someone was in the basement with Respondent. But the State established no basis at all for such a belief. According to Detective Frolich's own rationale for the search, it was general and

exploratory in nature. A holding by this Court that such residential searches are unreasonable would hardly advance Fourth Amendment jurisprudence. The writ should be denied.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this ____ day of May, 1989 a copy of the foregoing Brief In Opposition to Petition for Writ of Certiorari was delivered to Gary E. Bair, Assistant Attorney General, Office of the Attorney General, Munsey Building, 7 North Calvert Street, Baltimore, Maryland 21202.



John L. Kopolow
Assistant Public Defender

JOINT APPENDIX

(4)
No. 88-1369

Supreme Court, U.S.

FILED

JUL 20 1989

JOSEPH F. SPANIOL, JR.

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED FEBRUARY 16, 1989
CERTIORARI GRANTED JUNE 5, 1989

22/89

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The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Writ of Certiorari:

Reported Opinion of the Court of Appeals of Maryland, *Jerome Edward Buie v. State of Maryland*, No. 161, September Term, 1987 (filed November 28, 1988) Apx. 1

Reported Opinion of the Court of Special Appeals of Maryland, *Jerome Edward Buie v. State of Maryland*, No. 100, September Term, 1987 (filed October 9, 1987) Apx. 46

CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

April 7, 1986—Indictment filed.

May 12, 1986—Defendant's motion to suppress filed.

June 3, 1986—State's answer to motion to suppress filed.

December 2, 1986—Defendant's motion to suppress evidence heard and denied; trial commenced.

December 3, 1986—Jury returns guilty verdicts for robbery with a dangerous and deadly weapon and use of a handgun in the commission of a felony.

December 30, 1986—Defendant sentenced to 20 years for robbery with a dangerous and deadly weapon and 15 years consecutive for use of a handgun in the commission of a felony.

January 16, 1987—Defendant's notice of appeal filed.

October 9, 1987—Opinion and judgment of the Court of Special Appeals of Maryland.

November 16, 1987—Defendant's petition for writ of certiorari filed.

January 12, 1988—Order of the Court of Appeals of Maryland granting petition for writ of certiorari.

November 28, 1988—Opinion and judgment of the Court of Appeals of Maryland.

IN THE CIRCUIT COURT FOR
PRINCE GEORGE'S COUNTY, MARYLAND

Criminal Trials 86-504A

STATE OF MARYLAND,

vs.

JEROME EDWARD BUIE,

Defendant.

REPORTER'S OFFICIAL TRANSCRIPT
OF PROCEEDINGS

(Motions and Trial on the Merits)

VOLUME I of II

Courtroom No. 202

Upper Marlboro, Maryland

Tuesday, December 2, 1986

BEFORE:

HONORABLE JACOB S. LEVIN,
Associate Judge, and a jury

APPEARANCES:

For the State:

JOSEPH B. CHAZEN, ESQ.

For the Defendant:

JOHN F. SHAY, JR., ESQ.

* * * *

[2] 10:52 a.m.

PROCEEDINGS

* * * *

[10] (The jury was excused from the courtroom.)

THE COURT: All right. Mr. Chazen, call your first witness.

MR. CHAZEN: The State would call Officer Rozar, Your Honor.

MR. SHAY: At this point, I would ask for a rule on witnesses.

THE COURT: All witnesses who are going to testify in this matter, I would ask you to go outside. Go ahead.

JAMES T. ROZAR,

a witness produced on call of the State, having first been [11] duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHAZEN:

Q State your name, please.

A Jim Rozar. R O Z A R.

Q What is your employment?

A I am with the Prince George's County Police, Special Operations Division.

Q What rank are you, Officer?

A I am a Corporal.

Q And Corporal Rozar, how long have you been with the County Police?

A Seven years in April.

Q And were you working as a police officer on February 5, 1986?

A Yes, sir.

Q And as part of your duties, did there come a time where you went to the 5400 block of Riverdale Road, 67th Avenue, Riverdale, Maryland?

A Yes, sir.

Q And would you tell the judge, what brought you there?

A We had been working at surveillance for about three days at that address and I was en route to work, I guess it was about 3:00 o'clock, 3:15 and I heard over the police [12] radio, officers responding to that address. So I decided to go to that address and see exactly what was going on.

Q Now, corporal, what was the purpose of your surveillance?

A We were trying to locate a suspect in a robbery and obtain an arrest warrant for.

Q Do you know that suspect's name?

A Jerome Buie.

Q Did there come a time when you actually went to the house at 5400 67th Avenue?

A Yes, sir.

Q And when you got there, what did you find?

A When I got there I found two or three uniformed officers outside the house and, the door to the house was open and I could see officers inside the house. I went inside the house and there were two detectives on the main floor and Sergeant Dunn and uniformed—and a female uniformed officer starting up the stairs.

Q What did you do?

A I asked Sgt. Dunn if he had cleared the basement and he said no, only the first floor. He said that he had yelled down into the basement but got no response and he was going down to check the upstairs and I told him

that I would freeze the basement, which meant that I would stand at the stairs coming out of the basement so that if there were [13] someone in the basement they couldn't come up behind us.

Q Is that what you did?

A That is what I did.

Q And when you got to the basement, did you say or do anything at that time?

A Yes, sir. I was at the top, I was on the first floor. I didn't go into the basement and I had my service revolver out and was pointing down the stairs. And I yelled down to the basement for anyone down there to come out. And I did that twice and finally I heard a voice in the basement ask me who is it? And I told him again, whoever it was, at that point I said this is the police, show me your hands. And I said that about three times, I think. And finally, I saw a pair of hands come around the bottom of the stairwell. I told him to step forward where I could see him and, he did that and then I ordered him up the stairs. There were a pair of sneakers on the stairs. He started to pick those up. I told him to leave the sneakers alone and come up the stairs. He came up the stairs and put his hands where I could see them.

Q What did you do at that time?

A When he got to the top of the stairs I put him against the wall and searched him and handcuffed him.

Q And did you place him under arrest?

A Yes, sir.

[14] Q That was pursuant to the warrant, as far as you know?

A Yes, sir.

Q You didn't search any other part of the house?

A I didn't search any part of the house at all.

MR. CHAZEN: No further questions of this witness, Your Honor.

CROSS-EXAMINATION

BY MR. SHAY:

Q Corporal Rozar—is it?

A Yes, sir.

Q You were working out of surveillance of the house, for a warrant that you had obtained?

A I had not obtained the warrant, no.

Q Who had obtained the warrant?

A Detective Frolich from the Robbery Squad.

Q And there was a warrant outstanding for this gentleman?

A Yes, sir.

Q And this was February 5?

A Yes, sir.

Q What time of day was it?

A Approximately between 3:00 o'clock and 3:30. I was due to work at 4:00 o'clock.

Q In the afternoon?

[15] A Yes, sir.

Q You were on the way to work and you heard this radio call so you decided to go over there?

A Yes, sir. It was in the same block. Same hundred block that we had working surveillance for about three days.

Q By the time you got there, the house had pretty much been secured, is that right?

A The house had been entered.

Q If I understood your testimony, there were two uniformed officers outside, that you could see?

A Yes, sir.

Q And then when you got in the house you saw two detectives and two more uniformed officers?

A Yes, sir.

Q So there was six officers there altogether by the time you got there?

A Two outside and four inside, as I recall.

Q Including you then, there were seven officers at the house? All right. Let me get this straight. You went in and asked if the basement had been cleared. They were on the way upstairs?

A Yes, sir.

Q Was anybody else in the house? Was anybody, other than the suspect, in the house?

A There was a female outside the house on the steps.

[16] Q When you got there?

A Yes, sir.

Q But no one else was in the house, that you saw?

A Not that I saw, no, sir.

Q So they start up the steps and you decide that you are going to secure the basement?

A I asked Sgt. Dunn whether he had checked the basement or not and he said they had not yet.

Q And you started calling down the basement and then this man answers and says who is it?

A Yes, sir.

Q And then eventually he comes up and shows you his hands?

A Yes, sir.

Q You were at the top of the stairway, is that right?

A That is right.

Q Where did the stairway lead out of, on the floor that you were on in? Was it on the kitchen or hallway?

A It was in a hallway directly across, I believe, from the kitchen.

Q And he came up out of the basement into that hallway?

A Yes, sir.

Q And you put him up against the wall in the hallway, searched his person. Did you find anything on him?

A Not that I recall.

[17] Q He had no weapons?

A No, sir.

Q Nothing on him?

A No, sir.

Q How was he dressed?

A If I recall, he was wearing a sweatshirt and jeans.

Q And at that point, you arrested him?

A Yes, sir.

Q And you didn't search any of the area around him?

A No, sir.

Q You didn't see any need to do that?

A Not at that point.

Q You weren't worried about there being any danger or anything like that?

A No.

MR. SHAY: That is all I have.

MR. CHAZEN: No further questions.

THE COURT: Thank you very much, Officer Rozar.

Call your next witness.

MR. CHAZEN: Detective Frolich, Your Honor.

JOSEPH W. FROLICH,

a witness produced on call of the State, having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. CHAZEN:

[18] Q State your full name, please.

A Joseph W. Frolich, Prince George's County Police Department, currently assigned to the Robbery Squad, Forestville, Maryland.

Q And you're currently a detective, Detective Frolich?

A Yes, I am.

Q And were you working in that capacity back in February of this year, 1986?

A Yes, sir, I was.

Q And did there come a time where you participated in the investigation of an armed robbery of a Godfather's Pizza place?

A Yes, sir, I did.

Q And did there come a time where you developed any suspects in that case?

A Yes, sir.

Q And were any warrants obtained for anybody in that case?

A Yes, sir.

Q And who were the warrants obtained for?

A Jerome Buie and a Lloyd Allen.

Q And concerning Mr. Buie, do you recall what date the warrant was obtained?

A February 3rd, 1986.

Q Did there come a time when in fact Mr. Buie was [19] arrested?

A Yes, sir.

Q And were you present on the premises when the arrest was made?

A Yes, sir.

Q And do you remember what date that was?

A February 5, 1986.

Q What was the location of that arrest?

A 5400 67th Avenue, Riverdale.

Q Now, do you know which officer actually arrested Mr. Buie?

A Officer Rozar.

Q And were you present when that took place?

A Yes, sir.

Q Okay. Did you see Officer Rozar place the handcuffs on Mr. Buie?

A Yes, sir, I did.

Q After that was done, did you take any action?

A Yes, sir, I did.

Q What did you do?

A I entered the basement of the residence where the defendant Jerome Buie had exited.

Q And when you went down there, did you find anything of importance to your case?

A A red running suit.

[20] Q And explain to the judge what importance that had in the investigation, to you.

A It fitted the description from the victim Graham as being a jumpsuit worn by one of the defendants.

Q And at that time, you took it?

A Yes, sir.

Q Did you take anything else from the basement?

A No, sir.

MR. CHAZEN: No further questions, Your Honor.

CROSS-EXAMINATION

BY MR. SHAY:

Q Detective Frolich, did, at any time, you have a search warrant to search that premises?

A No, sir.

Q No warrant was ever requested?

A No, sir.

Q You say the arrest warrant was issued on the 3rd of February?

A Yes, sir.

Q Do you have a copy of that arrest warrant?

A Yes, sir.

Q May I see it?

(Document handed to Mr. Shay.)

BY MR. SHAY:

Q Thank you, detective.

[21] Detective, when you were at the house, there were approximately five or six other officers there as well?

A Yes, sir.

Q Did any of them have that warrant with them at the time?

A I had this warrant with me.

Q You had the warrant with you?

A Yes, sir.

Q And when did you first see Officer Rozar arresting Mr. Buie? Where had you been and how did you happen to come there?

A I was standing next to him when he called into the basement and, Mr. Buie came up out of the basement.

Q So you hadn't gone upstairs or hadn't searched any other part of the residence?

A No, sir.

Q What had you been doing since you had been there?

A We had just—Officer Rozar and myself had arrived at the same time and had just entered the residence.

Q You arrived in separate cars and went in together?

A Yes, sir.

Q And you heard him say that he was going to freeze the basement, as they say? I believe that is the words that he said or, secure the basement?

A Yes, sir.

[22] Q And you were also there when Mr. Buie showed Officer Rozar his hands, from the bottom of the steps, as requested to do?

A I couldn't see that.

Q Do you remember the officer requesting that he show him his hands?

A I don't recall.

Q But, in any event, Mr. Buie came out and came up the steps?

A Yes, sir.

Q Now, this stairway leads downstairs from a hallway on the main floor of the house?

A Yes, sir.

Q All right. Mr. Buie came up out of there and then was put against the wall in the hallway?

A Yes, sir.

Q Was anything else in the hallway, any furniture or anything of that nature?

A There could have been.

Q You observed the officer search Mr. Buie?

A Yes, sir.

Q And did he find anything on him?

A I don't recall.

Q And you observed the officer handcuff Mr. Buie?

A Yes, sir.

[23] Q And then place him under arrest?

A Yes, sir.

Q What did the officer do with Mr. Buie at that point?

A I don't know.

Q Took him out, whatever. At this point, you decided to go into the basement?

A Yes, sir.

Q Did you know what you were looking for?

A I just went down there in case there was someone else in the basement.

Q You just went down there to see if someone else was down there, to look around?

A Yes, sir.

MR. SHAY: That is all I have, Your Honor.

THE COURT: Anything further?

REDIRECT EXAMINATION

BY MR. CHAZEN:

Q Where, exactly, Detective Frolich, was the red jacket or sweatshirt found?

A It was laying out in a drying position across a stack of clothing.

Q It wasn't in any drawer, concealed in any way?

A No, sir.

THE COURT: It was out in the open?

THE WITNESS: Yes, sir.

[24] MR. CHAZEN: No further questions.

RECROSS-EXAMINATION

BY MR. SHAY:

Q Do you remember a young girl sitting out front or sitting out front when you came in?

A I think there were two young girls.

Q Did you speak to them at all?

A No, sir.

Q Did you have any reason to believe that anyone else was in the house besides Mr. Buie?

A I had no idea who lived there.

Q How did you find out that he might be there at the time?

MR. CHAZEN: Objection, Your Honor.

THE COURT: How did he find out he might be there at the time?

MR. SHAY: Right. All I am getting is, how much they knew to go there at the time.

THE COURT: Was this his home address?

THE WITNESS: Yes, sir.

THE COURT: All right.

BY MR. SHAY:

Q But, was there any particular knowledge that allowed you to know that he was home at that time?

A Yes, sir.

[25] Q What was that?

A I had a secretary in my office call his residence and ask to speak to him.

Q And who answered the phone?

A I don't know who answered the phone. But, I think it was a female and then she had a conversation with Mr. Buie.

Q So you knew there was a girl and a man there in the house?

A Yes, sir.

MR. SHAY: That is all I have.

MR. CHAZEN: Nothing further, Your Honor.

THE COURT: Thank you, Detective Frolich.

Call your next witness.

MR. CHAZEN: That is it, Your Honor.

THE COURT: Do you have any witnesses?

MR. SHAY: I would like to be heard on the Motion.

THE COURT: Sure.

MR. SHAY: First of all, it is clear in this case that there is no search warrant. The officers went to the house armed with an arrest warrant only. And they went in there to look for the person of Mr. Buie.

Your Honor, the case law is extremely clear on this point and, in fact there is a case written by Judge Couch, called Stackhouse vs. State, which was decided in 1983 and, the facts, Your Honor, are almost exactly like the facts in [26] this case. These officers went in the house with an arrest warrant to look for Mr. Buie. They found him and they arrested him.

At that point, Your Honor, the law is clear, dating back to the Chimel vs. California case, that when you're in somebody's residence, you don't have a search warrant, you are there to arrest him, once you arrest that person, you have the right to search his person and you have the right to search the area within his grasp or in his control.

If there had been a desk in that hall, with a drawer or anything like that, they could have searched that. If there had been shelves in that hallway or anything of that nature, they could have searched those shelves. Even after he was handcuffed, the cases say, because he could maybe lunge or something. But once he was arrested and the officer said he had him under control, he was not worried about there being any weapons or anything anywhere else, that was the end of it. They had no right to go into any other part of that house to search for anything.

If Your Honor would look at the Stackhouse case, which is 468 A 2d 333, in that case, Your Honor, the police came to the house, it was the exact same situation. It was a supposed armed robbery. They came to the house, there was a sister in the house. They searched around the house for the person. They had a arrest warrant only and then finally [27] got to an attic and the officer stood at the bottom of the doorway to the attic and he yelled up to the person to come out. The person didn't come out right away so the officer went up into the attic a little ways and shone his flashlight down into the room and he told the person, I see you, come out where I can see you. Exactly like this case. Eventually the person came out. The officer backed down the steps of the attic, got him into the hallway which leads up to the attic and searched him and handcuffed him and arrested him. At that point, the same officer, the same officer, not a different officer as in this case, went up into the attic, shone his flashlight around and found a gun that was the suspected weapon used in the robbery. Found that gun. The Court of Appeals stated in that situation, unequivocally, that in that situation, you only have the right to search within the person's grasp, since they got him out of the attic and arrested him down in the hallway, they had the right to search only that area of the house. They did not have the right to go rummaging into other areas of the house, not even the room where he had come out of, because the only

right you have is to protect yourself. All right. To protect yourself in that situation.

Now, the Stackhouse case went a little further because they tried to argue exigent circumstances which, if the State wants to prove that, that is their burden. They [28] haven't done that in this case. They argued in that case that the sister had lied to the police about whether or not the man was in there previously. We don't have that in this case. The Court said even that was not an exigent circumstance. They said it's only in hot pursuit or in situations where the evidence might be in some danger of being destroyed. Those are mostly narcotic cases.

Your Honor, this case could not be more on all fours with that case. I think it's completely clear that the evidence, that that jumpsuit or whatever it is, should be suppressed.

THE COURT: All right. Mr. Chazen?

MR. CHAZEN: I think that the police conduct in the case, wherein they have an absolute right to arrest Mr. Buie, they do arrest him, he comes from a basement, in a case where they're looking at an armed robbery, that they go down to look around the basement to make sure that no one else is there, for their own protection, to check it out and then in plain view they don't open any drawers, they don't hide anything, they just see evidence that they know is part of the crime. It is in open view at that point. They have a right to be on the premises and therefore they have a right to seize it.

I don't agree that that case is exactly on point as our case and, I think that in this case he came down from [29] the basement. They went in. It was lying there. It would be foolish to say that the police, who have a right to be there, should turn their eyes and ignore something that is obvious to the case.

THE COURT: I think they had a right to search him and I think they had a right to seize, based on the facts of this case. The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a warrant, that wouldn't have been there.

Accordingly, the Motion to Suppress is denied.

We will take a luncheon recess now.

(At 12:12 p.m. a luncheon recess was taken.)

* * * *

PETITIONER'S BRIEF

IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Where police possess arrest warrants for an armed robbery suspect and his accomplice, is it reasonable under the Fourth Amendment for the officers, when arresting the suspect in his home, to make a cursory safety check of the premises to determine whether the accomplice or other persons are present?

PARTIES

The caption contains the names of all the parties below.

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1989

—
No. 88-1369
—

STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

—
ON WRIT OF CERTIORARI TO
THE COURT OF APPEALS OF MARYLAND
—

BRIEF FOR PETITIONER
—

OPINIONS BELOW

The opinion of the Court of Appeals of Maryland is reported, *Buie v. State*, 314 Md. 151, 550 A.2d 79 (1988), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 1-45).

The opinion of the Court of Special Appeals of Maryland is reported, *Buie v. State*, 72 Md. App. 562, 531 A.2d 1290 (1987), and is reproduced in the petition for writ of certiorari. (Cert. Pet. Apx. 46-81).

STATEMENT OF JURISDICTION

The opinion of the Court of Appeals of Maryland reversing Respondent Jerome Edward Buie's convictions was filed on November 28, 1988. On January 18, 1989, Chief Justice Rehnquist ordered that the time for filing the petition for writ of certiorari be extended to and including February 16, 1989. The petition for writ of certiorari was filed on that date and was granted on June 5, 1989.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1257(a) and Rules of this Court, Rule 17.1(b) and (c).

CONSTITUTIONAL PROVISION INVOLVED

United States Constitution, Amendment IV:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On February 3, 1986, Detective Joseph Frolich of the Prince George's County Police Department obtained a warrant for the arrest of Jerome Edward Buie. (J.A. 9-10). Buie and Lloyd Allen, for whom the police also obtained an arrest warrant, were suspected of having robbed, at gunpoint, a Godfather's Pizza restaurant on February 3, 1986. (J.A. 9-10). Two days later, on February 5, 1986, police arrested Buie in

his home and seized a red running suit. (J.A. 10-11, 15). A victim of the robbery had said that one of the robbers wore a red running suit. (J.A. 11).

A pre-trial hearing was held in the Circuit Court for Prince George's County, Maryland, on December 2, 1986, pursuant to Buie's motion to suppress the red running suit. (J.A. 1). Detective Frolich and another member of the Prince George's County Police Department, Corporal James Rozar, were the only witnesses. Both were called by the State, and their combined testimony disclosed the following.¹

After the robbery occurred, the police began a surveillance of Buie's home in order to locate him. (J.A. 4). Before the arrest warrant was executed, a secretary from Detective Frolich's office telephoned Buie's residence to confirm that Buie was then there. (J.A. 15). A female answered, and the secretary spoke with Buie. (J.A. 15-16). Frolich and five or six other officers, including Corporal Rozar, then went to Buie's home. (J.A. 7, 12). It was around 3:30 in the after-

¹ At trial, the court allowed the State to reopen the suppression hearing; additional testimony was taken from Detective Frolich. (Tr. 12/3/86, at 24-31). At the conclusion of the hearing, the court again denied Buie's motion to suppress the red running suit. (*Id.* at 31-32). Finding that the reopening of the suppression hearing was error under state law, both the Court of Appeals and the Court of Special Appeals of Maryland refused to consider any evidence introduced at that hearing. (Cert. Pet. Apx. 7-8, 56-59).

The State of Maryland does not now challenge the rulings of the Maryland appellate courts on the issue of reopening the suppression hearing. Accordingly, this Statement of the Case and the ensuing Argument present and rely on only those facts adduced at the pre-trial-suppression hearing.

noon; two young girls were on the steps outside of the house. (J.A. 4, 6-7, 15).

When Rozar and Frolich entered the house at least four police officers were in the process of securing the premises. (J.A. 4, 12-13). Two detectives were on the main floor and two officers, one of whom was Sergeant Dunn, were on their way upstairs. (J.A. 4). Buie had not yet been located. (J.A. 4-5). Dunn told Rozar that he had secured the first floor but not the basement. (J.A. 4). Dunn also said that he had "yelled down into the basement," but had not received a response. (J.A. 4). Rozar agreed to "freeze" the basement, so that "if there were someone in the basement they couldn't come up behind us." (J.A. 4-5).

Rozar and Frolich proceeded to the hallway across from the kitchen, and Rozar pointed his service revolver down the basement stairs, yelling twice for anyone there to ascend. (J.A. 5, 8, 12-13). Rozar eventually heard a voice ask, "who is it?" (J.A. 5). Several times Rozar identified himself as a policeman and said "show me your hands." (J.A. 5). Rozar finally saw a pair of hands come around the bottom of the stairwell. (J.A. 5). He then instructed the person to come into view. (J.A. 5). The person, who happened to be Buie, did so, and Rozar ordered him to ascend the stairs. (J.A. 5). When Buie stopped to pick up a pair of sneakers, Rozar told him to leave the sneakers alone. (J.A. 5). Buie then came up the stairs, and Rozar arrested him. (J.A. 5).

Rozar handcuffed and searched Buie, but found no weapon. (J.A. 5, 8). Rozar did not search the hall area at the top of the stairs surrounding Buie because he was not then "worried about there being any danger." (J.A. 8-9). Frolich, however, who said he did

not know how many people were in the house, descended the stairs "in case there was someone else in the basement." (J.A. 11, 14-15). In the basement Frolich saw the red running suit and seized it. (J.A. 11). When asked where he found the running suit, Frolich explained that it was not in a drawer or otherwise concealed but was lying on a stack of clothing. (J.A. 14).

Seeking suppression of the running suit, Buie claimed that once the police arrested him, they had no authority to enter his basement without a search warrant. (J.A. 16-18). The State argued that the police were entitled to conduct a cursory check of the basement for persons in order to protect themselves. (J.A. 18). The trial court denied Buie's motion to suppress, saying (J.A. 19):

I think they had a right to search him and I think they had a right to seize, based on the facts of this case. The man comes out from a basement, the police don't know how many other people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a warrant, that wouldn't have been there.

At trial, the State introduced the running suit into evidence. (Tr. 12/3/86, at 48-49). On December 3, 1986, a jury found Buie guilty of robbery with a dangerous and deadly weapon and use of a handgun in the commission of a felony. (J.A. 1). On December 30, 1986, Buie was sentenced to a total of 35 years in prison. (J.A. 1).

The Court of Special Appeals of Maryland affirmed the judgment of the trial court. (Cert. Pet. Apx. 46-81). The court found that Detective Frolich "went into [Buie's] basement to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene." (Cert. Pet. Apx. 64). Applying a standard of reasonableness, and finding that the police officers had reasonably suspected that Buie's accomplice was still at large, Maryland's intermediate appellate court upheld the denial of Buie's motion to suppress. (Cert. Pet. Apx. 75-76).

The Court of Appeals of Maryland, in a four to three decision, reversed Buie's convictions. Analyzing the police conduct in Buie's home as a protective sweep, which it viewed as encompassing a search for accomplices or any other persons who might be hiding on the premises, (Cert. Pet. Apx. 13), the majority concluded: "[T]he facts in this case simply do not provide probable cause to support a reasonable belief that an accomplice was in Buie's home, that other confederates might have been there, or that any other serious and demonstrable potentiality for danger existed." (Cert. Pet. Apx. 36). The majority thus held that the limited search of Buie's basement and the seizure of the red running suit "were unconstitutional because they violated rights established by the fourth amendment to the United States Constitution." (Cert. Pet. Apx. 2).

The three dissenting judges balanced "the limited nature of the intrusion, and the exigencies of the situation," and concluded that the protective sweep was reasonable. (Cert. Pet. Apx. 44-45). In the dissenters' view, "[f]or the police to make a quick sweep of the basement from which Buie had emerged was

reasonable, whether to check for the presence of the accomplice who had so recently been involved with Buie and an armed robbery, or to protect themselves from others who might have been hiding with Buie." (Cert. Pet. Apx. 44).

SUMMARY OF ARGUMENT

The protective check of a home during the execution of an arrest warrant is an essential component of the arrest. Police must ascertain the presence of third parties who could endanger the lives of officers or innocent bystanders, or could be in danger themselves. cursory safety checks have long been approved by the lower federal and state courts and, whether viewed under the standard of "general reasonableness" or as an exception to the warrant requirement, are reasonable under the Fourth Amendment.

Analyzed under the general reasonableness balancing test, the security check of an arrestee's home is proper because the compelling need to preserve lives, both of police officers and other persons who may be on the premises during the execution of an arrest warrant, far outweighs the limited intrusion that occurs when the safety check is conducted. And, inasmuch as every in-home arrest for a violent crime presents a life-threatening situation, police should be permitted to conduct a protective walk-through whenever they make such an arrest.

Alternatively, the security check of an arrestee's home falls within the ambit of the *Terry* doctrine, a well-recognized exception to the Fourth Amendment's warrant and probable cause requirements. To conduct a limited search of a home, police need only reason-

ably suspect that there exists a risk of danger to the officers or others at the arrest scene. Here, the police had the requisite articulable suspicion.

Whether analyzed under the general reasonableness balancing test or under the *Terry* doctrine, Detective Frolich's cursory check of Buie's basement for third persons was lawful Fourth Amendment conduct. When, in the course of that check, Detective Frolich observed the red running suit, which he had probable cause to believe was connected with the armed robbery for which Buie was being arrested, he had a right to seize it under the plain view doctrine.

ARGUMENT

WHERE POLICE POSSESS ARREST WARRANTS FOR AN ARMED ROBBERY SUSPECT AND HIS ACCOMPLICE, IT IS REASONABLE UNDER THE FOURTH AMENDMENT FOR THE OFFICERS, WHEN ARRESTING THE SUSPECT IN HIS HOME, TO MAKE A CURSORY SAFETY CHECK OF THE PREMISES TO DETERMINE WHETHER THE ACCOMPLICE OR OTHER PERSONS ARE PRESENT.

A. Introduction: A security check is a reasonable and essential component of an in-home arrest.

The security check or "protective sweep" of a home during an arrest, which contemplates a quick pass-through of the premises to ascertain the presence of third persons, is used by police to ensure their own safety and that of others. This cursory security procedure must be available to law enforcement agencies because the potential for violence exists whenever an arrest is made in someone's home.

Although this Court has yet to rule on the propriety of cursory security checks, it has referred to these limited searches on several occasions. In *Payton v.*

New York, 445 U.S. 573, 589 (1980), for example, the Court noted that the execution of an arrest warrant in the home might involve a limited protective search "because the police may need to check the entire premises for safety reasons." In other cases, too, opinions of the Court have spoken of safety checks as though they are an acceptable practice. *Maryland v. Garrison*, 480 U.S. 79, 101 (1987) (Blackmun, J., dissenting) (officers "should have realized the error in the warrant from their initial security sweep"); *Segura v. United States*, 468 U.S. 796, 800-01 (1984) (agents had conducted a "limited security check of the apartment to ensure that no one else was there who might pose a threat to their safety or destroy evidence"); *Warden v. Hayden*, 387 U.S. 294, 298-99 (1967) (police in hot pursuit of a robber could conduct a thorough search of house for persons and weapons so as to ensure that the suspect "was the only man present and that the police had control of all weapons which could be used against them or to effect an escape"). See also *Mincey v. Arizona*, 437 U.S. 385, 392-93 (1978) (security check conducted at murder scene; subsequent exploratory search found to violate the Fourth Amendment).

The issue, then, is not so much *whether* security checks are reasonable under the Fourth Amendment, but *when* they are reasonable. All twelve federal circuit courts of appeal² and at least thirty-three state

² E.g., *United States v. Gerry*, 845 F.2d 34 (1st Cir. 1988); *United States v. Standridge*, 810 F.2d 1034 (11th Cir.) (per curiam), cert. denied, 481 U.S. 1072 (1987); *United States v. Mabry*, 809 F.2d 671 (10th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 33 (1987); *United States v. Escobar*, 805 F.2d 68 (2d Cir. 1986); *United States v. Kolodziej*, 706 F.2d 590 (5th Cir. 1983); *United*

courts³ have addressed these cursory security checks. In the absence of a definitive decision by this Court,

States v. Jones, 696 F.2d 479 (7th Cir. 1982), *cert. denied*, 462 U.S. 1106 (1983); *United States v. Hatcher*, 680 F.2d 438 (6th Cir. 1982); *United States v. Gardner*, 627 F.2d 906 (9th Cir. 1980); *United States v. Velasquez*, 626 F.2d 314 (3d Cir. 1980); *United States v. Baker*, 577 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978); *United States v. Carter*, 522 F.2d 666 (D.C. Cir. 1975); *United States v. Blake*, 484 F.2d 50 (8th Cir. 1973), *cert. denied*, 417 U.S. 949 (1974).

³ *E.g.*, *Owen v. State*, 418 So.2d 214 (Ala. Crim. App. 1982); *State v. McCleary*, 116 Ariz. 244, 568 P.2d 1142 (1977); *Holden v. State*, 290 Ark. 458, 721 S.W.2d 614 (1986); *People v. Coffee*, 107 Cal. App. 3d 28, 165 Cal. Rptr. 676 (1980); *Vance v. United States*, 399 A.2d 52 (D.C. 1979); *Newton v. State*, 378 So.2d 297 (Fla. App.), *cert. denied*, 389 So.2d 1115 (Fla. 1980); *State v. Scott*, 176 Ga. App. 887, 339 S.E.2d 276 (1985); *People v. Free*, 94 Ill. 2d 378, 447 N.E.2d 218, *cert. denied*, 464 U.S. 865 (1983); *Williams v. State*, 397 N.E.2d 1088 (Ind. App. 1979); *State v. Holland*, 389 N.W.2d 375 (Iowa 1986); *State v. Huff*, 220 Kan. 162, 551 P.2d 880 (1976); *Commonwealth v. Elliott*, 714 S.W.2d 494 (Ky. Ct. App. 1986); *State v. Guiden*, 399 So.2d 194 (La. 1981), *cert. denied*, 454 U.S. 1150 (1982); *Buie v. State*, 314 Md. 151, 550 A.2d 79 (1988); *Commonwealth v. Walker*, 370 Mass. 548, 350 N.E.2d 678, *cert. denied*, 429 U.S. 943 (1976); *People v. Olajos*, 397 Mich. 629, 246 N.W.2d 828 (1976); *State v. Willis*, 269 N.W.2d 355 (Minn. 1978); *Norman v. State*, 302 So.2d 254 (Miss. 1974), *cert. denied*, 421 U.S. 966 (1975); *State v. Dayton*, 535 S.W.2d 479 (Mo. App. 1976); *State v. Monzu*, 227 Neb. 902, 420 N.W.2d 726 (1988); *Koza v. State*, 100 Nev. 245, 681 P.2d 44 (1984); *State v. Smith*, 140 N.J. Super. 368, 356 A.2d 401 (1976), *aff'd*, 75 N.J. 81, 379 A.2d 1275 (1977); *Rodriguez v. State*, 91 N.M. 700, 580 P.2d 126 (1978); *People v. Green*, 103 A.D.2d 362, 480 N.Y.S.2d 220 (1984); *State v. Taylor*, 298 N.C. 405, 259 S.E.2d 502 (1979); *State v. Super*, 37 Or. App. 731, 588 P.2d 106 (1978); *Commonwealth v. Curry*, 343 Pa. Super. 400, 494 A.2d 1146 (1985); *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882 (1986); *State v. Wilson*, 687 S.W.2d 720 (Tenn. Crim. App. 1984), *cert. denied*, 472 U.S. 1030 (1985); *Pope v. State*,

the lower courts have adopted a variety of analytical approaches and have required varying levels of objective justification to uphold these quick and limited searches. Some courts require articulable suspicion that third parties are on the premises. *E.g.*, *United States v. Castillo*, 866 F.2d 1071, 1079 (9th Cir. 1988). Other courts, like the dissenting members of the Court of Appeals of Maryland in this case, consider the totality of the circumstances, balancing the exigency of the situation against the limited nature of the intrusion. *E.g.*, *United States v. Baker*, 577 F.2d 1147, 1152 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978). Still other courts, like the majority in this case, insist that the police have probable cause to believe that third parties are present before allowing them to check the entire house. *E.g.*, *United States v. Gerry*, 845 F.2d 34, 36-37 & n.1 (1st Cir. 1988); *United States v. Kolodziej*, 706 F.2d 590, 597 (5th Cir. 1983).⁴ However diverse their approaches and standards are, the lower court decisions reinforce the premise that security checks are reasonable and that the real issue is under what circumstances police may conduct these checks.

635 S.W.2d 815 (Tex. App. 1982); *State v. Kelly*, 718 P.2d 385 (Utah 1986); *State v. Toliver*, 5 Wash. App. 321, 487 P.2d 264 (1971); *Brown v. State*, 738 P.2d 1092 (Wyo. 1987).

⁴ Various commentators have catalogued and analyzed these and other lower court approaches to security checks. *E.g.*, 2 W. LaFave, *Search and Seizure* §6.4 (2d ed. 1987); 1 W. Ringel, *Searches & Seizures, Arrests and Confessions* §12.6(a) (2d ed. 1989); Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers From Attack by Persons Other Than the Arrestee*, 33 Cath. U.L. Rev. 95 (1983); Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously With an Arrest On or Near Private Premises*, 30 Syracuse L. Rev. 973 (1979).

—Security checks are most appropriately analyzed either under the general reasonableness balancing test or under the *Terry* stop and frisk exception to the Fourth Amendment's warrant and probable cause requirements. Regardless of which approach is used, the same conclusion obtains: cursory security checks are reasonable police conduct under the Fourth Amendment and evidence found in plain view during these checks can lawfully be seized.

B. Under the general reasonableness analysis, security checks are permissible whenever police execute an arrest warrant for an armed robbery or other dangerous crime.

1. It is appropriate to use the general reasonableness balancing test to evaluate security checks.

Security checks, though limited intrusions on personal privacy, are nonetheless "searches" within the meaning of the Fourth Amendment. But, "[t]o hold that the Fourth Amendment is applicable . . . is only to begin the inquiry into the standards governing" the protective check. *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. ___, 109 S.Ct. 1402, 1413-14 (1989). As this Court has stated: "The Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches and seizures." *United States v. Sharpe*, 470 U.S. 675, 682 (1985) (emphasis in original). Reasonableness is a measure of both the circumstances surrounding the intrusion and the nature of the intrusion itself. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985). Whether a particular practice is permissible is determined "by balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental in-

terests." *Delaware v. Prouse*, 440 U.S. 648, 654 (1979). While in most criminal cases a police practice is reasonable only if conducted with a warrant and probable cause, those requirements will yield when compelling needs render them impracticable. *Skinner*, 109 S.Ct. at 1414.

Terry v. Ohio, 392 U.S. 1 (1968), represents this Court's first use of the balancing test in a criminal case to uphold a warrantless search based on less than probable cause. In the two decades that have followed, this Court has repeatedly used the balancing approach to authorize governmental intrusions on less than probable cause. *E.g.*, *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975) (vehicle stop in areas near the Mexican border); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (routine vehicle stop at border checkpoint); *Bell v. Wolfish*, 441 U.S. 520 (1979) (body cavity search of prisoners); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student by school officials); *United States v. Montoya de Hernandez*, 473 U.S. 531 (1985) (16-hour detention of person at border); *O'Connor v. Ortega*, 480 U.S. 709 (1987) (employer search of employee's office); *New York v. Burger*, 482 U.S. 691 (1987) (administrative inspection of automobile junkyard); *Griffin v. Wisconsin*, 483 U.S. 868 (1987) (probation officer's search of probationer's home); *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 109 S.Ct. 1384 (1989) (drug testing of customs service employees); *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. ___, 109 S.Ct. 1402 (1989) (drug testing of railroad employees). In each of these cases, a special governmental need was balanced against, and found to outweigh, the intrusion occasioned by the governmental conduct. While a

number of these later cases involve administrative, as opposed to law enforcement, interests, *Terry* itself stands as a redoubtable reminder that use of the balancing approach is appropriate in criminal cases where officer safety is at issue. Indeed, in *United States v. Place*, 462 U.S. 696, 703-04 (1983), this Court noted that even a generalized interest in law enforcement can justify an intrusion based on less than probable cause.

Officer safety and the safety of others, the very needs which prompted this Court to use the balancing approach in *Terry*, bespeak the use of that approach in the security check context. "Every arrest must be presumed to present a risk of danger to the arresting officer," *Washington v. Chrisman*, 455 U.S. 1, 7 (1982), which can escalate when third persons are at the arrest scene. This is especially true when the arrest is for a violent crime. Weighed against the government's interest in ensuring the safety of its agents and the public is the brief and limited intrusion that comprises the security check for third persons in an arrestee's home. Inasmuch as the governmental interest in preserving lives is, without a doubt, as compelling an interest as one can envision, it cannot yield to the minimal intrusion of the home that attends a cursory security check. Furthermore, because the police are acting in a situation that requires swift and immediate conduct, they need a single, workable rule when confronting the dangers inherent in an in-home arrest. Accordingly, they should be allowed to secure the premises whenever they execute an arrest warrant in the home for a violent crime such as armed robbery.

2. Officer safety and safety of others are compelling governmental interests.

In *Chimel v. California*, 395 U.S. 752 (1969), this Court defined the area in which police can act to neutralize the danger posed by the arrestee. *Chimel* recognizes and addresses only part of the risk that inheres in an in-home arrest. Other persons at the arrest scene can pose an equally grave threat of violence. Indeed, persons who remain undetected can exploit their anonymity to escalate a situation already fraught with danger.

For two distinct safety-related reasons, the police need to ascertain the presence of third persons at the scene of an in-home arrest. At any time while the officers are at the arrest scene, third persons can intervene to aid the arrestee or otherwise thwart the arrest. Additionally, innocent bystanders can be injured if a violent confrontation erupts. Review of but a few examples demonstrates the myriad of life-threatening situations that can flow from an in-home arrest when third persons are present. An incensed spouse of the arrestee might attempt to interfere with the arrest. A small child, unaware that a parent is being arrested, might wander onto the scene and create a perilous distraction. An accomplice, lurking in another room, might take someone hostage or attack the officers or the arrestee as they are leaving the premises.

The facts of this case illustrate why all armed robbery arrests are inherently dangerous and why that danger does not dissipate until the officers and the arrestee have left the arrest scene. When the police arrived at Buie's home, they had probable cause to believe that just two days earlier Buie and Lloyd

Allen had perpetrated a robbery at gunpoint. Allen had not yet been arrested. A telephone call to Buie's residence shortly before the officers' arrival had been answered by an unidentified female. Two young girls were sitting just outside Buie's front door.

Knowing all of this, and armed with an arrest warrant, the six officers who entered Buie's house immediately fanned out to secure the premises and search for Buie. Two officers went upstairs; two officers checked the main floor; and two officers, Rozar and Frolich, went to the top of the basement stairs and "froze" that area. Corporal Rozar made repeated demands for anyone in the basement to come forward. After initially ignoring Rozar's commands, Buie finally emerged from the basement. He was arrested and searched at the top of the stairs. No weapon was found.

Following Buie's arrest, Detective Frolich immediately completed the security check of the house by entering the basement to see if anyone else was there.⁵ Even though Buie was in custody, it was crit-

⁵ The majority opinion of the Court of Appeals of Maryland characterizes the security check of Buie's basement as having occurred only after Buie was "safely" outside the house. (Cert. Pet. Apx. 36). The State of Maryland believes that a fair reading of Detective Frolich's testimony supports the conclusion that he descended the basement stairs immediately after Buie was arrested in the hallway at the top of the basement stairwell. (J.A. 10-11, 13-14). But, whether or not Buie was still in the house, the premises had not yet been entirely secured. Persons in the basement could well have attacked the police even as the police were driving away. See note 6, *infra*.

The State of Maryland also contests two other characterizations of the facts found in the majority's opinion. The majority

ical that this remaining area of the house be secured. As the trial court found, "[t]he man comes out from a basement, the police don't know how many other people are down there." Stated more expressly, the gun that had been used in the recent robbery had not been recovered. The woman who had answered the telephone earlier had not been located. For all the police knew, this woman and Lloyd Allen were lurking in the basement with the gun. And, given Buie's initial reluctance to reveal himself, it was conceivable that these unaccounted for persons were conspiring with Buie, during the interim before he surrendered, to thwart the arrest as the police were leaving the house. If Detective Frolich had not checked the basement, he would have left himself, his fellow officers, and the two young girls on the front steps unnecessarily exposed to grave danger.⁶

concludes that the suppression hearing testimony did not reflect that a gun had been used in the robbery, (Cert. Pet. Apx. 35), whereas the record shows that the police at Buie's home were investigating "an armed robbery," (J.A. 9). Common sense dictates that "armed" was being used to connote its usual meaning, i.e., with a gun. The majority also concludes that the police had reason to believe that only Buie and an unidentified woman were in the home at the time of the arrest. (Cert. Pet. Apx. 35). Not only does the dissenting opinion challenge this conclusion, (Cert. Pet. Apx. 43-44), the majority's characterization runs counter to Detective Frolich's testimony that he did not know how many people were in the house, (J.A. 14-15), and the trial court's express finding to this same effect, (J.A. 19).

⁶ Many security checks of the arrestee's home are conducted after the arrest, but before the officers leave the scene. That these checks are routinely upheld by the lower courts is but a recognition that the risk of danger does not dissipate the moment the arrestee is taken into custody. *E.g., United States v. Gerry*, 845 F.2d 34, 35 (1st Cir. 1988) (30 seconds after Gerry

Time and time again, this Court has recognized that officer safety and the safety of others are compelling governmental interests.⁷ Surely, this interest is more

was arrested, officers walked quickly through trailer to look for other persons suspected of being on premises); *United States v. Standridge*, 810 F.2d 1034, 1037-38 (11th Cir.) (per curiam), cert. denied, 481 U.S. 1072 (1987) (after arresting Standridge, officers checked for other persons under bed and in bathroom); *United States v. Mabry*, 809 F.2d 671, 675 (10th Cir.), cert. denied, ___ U.S. ___, 108 S.Ct. 33 (1987) (after arrestees were handcuffed and seated, officers conducted "sweep" search of home and adjacent garage for weapons and other persons); *United States v. Escobar*, 805 F.2d 68, 69 (2d Cir. 1986) (after arresting Escobar in his doorway, agents fanned out to search for accomplice "and anyone else who might pose a threat to the agents or destroy evidence"); *United States v. Whitten*, 706 F.2d 1000, 1014 (9th Cir. 1983), cert. denied, 465 U.S. 1100 (1984) (following Whitten's arrest outside of his home, officers "swept" the premises to ascertain the presence of unaccounted for accomplices who were believed to be armed and in area); *United States v. Baker*, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978) (officers conducted security check of home because they feared "that there might be an armed accomplice in the house, who, observing the arrest of the appellant and Miranda, would fire on them"); *United States v. Blake*, 484 F.2d 50, 56-57 (8th Cir. 1973), cert. denied, 417 U.S. 949 (1974) (after arrest of Vales in kitchen, officers went to basement for quick and cursory check for presence of others who might pose a security risk).

⁷ E.g., *United States v. Hensley*, 469 U.S. 221 (1985); *New York v. Quarles*, 467 U.S. 649 (1984); *Michigan v. Clifford*, 464 U.S. 287 (1984); *Michigan v. Long*, 463 U.S. 1032 (1983); *Washington v. Chrisman*, 455 U.S. 1 (1982); *Michigan v. Summers*, 452 U.S. 692 (1981); *Donovan v. Dewey*, 452 U.S. 594 (1981); *Ybarra v. Illinois*, 444 U.S. 85 (1979) (Rehnquist, J., dissenting); *Bell v. Wolfish*, 441 U.S. 520 (1979); *Mincey v. Arizona*, 437 U.S. 385 (1978); *Michigan v. Tyler*, 436 U.S. 499 (1978); *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam); *South*

compelling than many of the special needs that have been found to justify warrantless Fourth Amendment intrusions on less than probable cause. Protecting human life is far more compelling than detecting drug use in customs agents, *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1392-93; operating a probation system, *Griffin v. Wisconsin*, 483 U.S. at 873-74; interdicting the flow of illegal aliens, *United States v. Brignoni-Ponce*, 422 U.S. at 878-79; *United States v. Martinez-Fuerte*, 428 U.S. at 552; deterring automobile theft, *New York v. Burger*, 482 U.S. at 708-10; fostering the efficient and proper operation of the workplace, *O'Connor v. Ortega*, 480 U.S. at 723; and maintaining order in the classroom, *New Jersey v. T.L.O.*, 469 U.S. at 339-40. Indeed, in contexts similar to the security check, this Court has found officer safety and the safety of others to be so compelling as to obviate the need for both a warrant and probable cause. *Michigan v. Long*, 463 U.S. 1032, 1049 (1983) (cursory check of car for weapons during detention of driver); *Pennsylvania v. Mimms*, 434 U.S. 106, 111 (1977) (per curiam) (ordering driver out of car during stop for routine traffic violation); *Adams v. Williams*, 407 U.S. 143, 147-48 (1972) (removal of weapon from driver's waistband based on informer's tip). Here, where the identical safety needs abound, the conclusion can be no different.

Dakota v. Opperman, 428 U.S. 364 (1976) (Powell, J., concurring); *Cady v. Dombrowski*, 413 U.S. 433 (1973); *Adams v. Williams*, 407 U.S. 143 (1972); *Chimel v. California*, 395 U.S. 752 (1969); *Warden v. Hayden*, 387 U.S. 294 (1967).

3. The cursory security check is minimally intrusive and, on balance, its impact on privacy interests is outweighed by the government's paramount interest in police safety.

The governmental need to ensure the safety of police officers and others is so compelling that it cannot yield to the *de minimus* intrusion on privacy interests that occurs when police conduct a cursory safety check of an arrestee's home. While it is true that the "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed," *Payton*, 445 U.S. at 585 (quoting *United States v. United States District Court*, 407 U.S. 297, 313 (1972)), the cursory security check presupposes that the police have lawfully entered the premises.⁸ Additionally, it is both brief in execution and superficial in scope. Within but a few minutes, officers do nothing more than cursorily check those areas of the entire house where a person could hide. This limited walk-through involves only that intrusion which is necessary to confirm the presence or absence of third persons at the arrest scene. And, by definition, the security check for third persons does not entail the routine exploratory rummaging through the homeowner's papers or effects that was the focus of the Court's concern in *Chimel v. California*.

Like seizures of property and searches of persons, searches of property can vary in degree of intrusiveness. In *United States v. Place*, 462 U.S. at 705, this Court recognized that "[t]he intrusion on possessory interests occasioned by a seizure of one's personal

⁸ The lawful entry into the home renders inapposite cases like *Steagald v. United States*, 451 U.S. 204 (1981), and *Vale v. Louisiana*, 399 U.S. 30 (1970), where the initial entry onto the premises was found to violate the Fourth Amendment.

effects can vary both in its nature and extent." Accordingly, "some brief detentions of personal effects may be so minimally intrusive of Fourth Amendment interests that strong countervailing governmental interests" permit a seizure on less than probable cause. *Id.* at 706. And, of course, in *Terry* itself this Court determined that a limited pat-down search of the person is less intrusive than a full-scale search incident to arrest. 392 U.S. at 25-27.⁹

The intrusion into Buie's privacy that occurred as a result of the cursory check, like the intrusions at issue in *Place* and *Terry*, was minimal. The police had lawfully entered Buie's home pursuant to an arrest warrant. Once in Buie's home, the officers quickly walked through the first and second floors of the house. The subsequent check of the basement, which merely completed the cursory pass-through of Buie's

⁹ *Terry's* recognition that there are varying degrees of intrusiveness implicated by a search is not inconsistent with this Court's remark in *Arizona v. Hicks*, 480 U.S. 321, 325 (1987), that "[a] search is a search." Although the security check is a type of search, it is a search for persons only and does not entail an intrusion into those places where persons cannot hide.

Furthermore, unlike the search of the stereo equipment in *Hicks*, which went beyond the scope of the exigency justifying the entry, the cursory security check is not separate from and "unrelated to the objectives of the authorized intrusion." *Id.* Indeed, the security search is an "operational necessity," *see id.* at 327, in that it ensures the integrity of the arrest and the safety of all persons at the arrest scene. Additionally, unlike in *Hicks* where the police did not have probable cause to seize the stereo equipment, police at Buie's home had undisputed probable cause to seize the red running suit as it lay undisturbed on the stack of clothing. *See* Section D., *infra*.

multi-level dwelling, likewise was swift and superficial.

The intrusion occasioned by this cursory check pales in comparison with other intrusions on personal privacy that this Court has upheld as reasonable. The security check is not as invasive as a 16-hour warrantless detention of a woman to await the expulsion of controlled dangerous substances from her bowels. *United States v. Montoya de Hernandez*, 473 U.S. at 542-44. It is not as invasive as either a body cavity search, *Bell v. Wolfish*, 441 U.S. at 558-60, or compulsory urination on demand and in the presence of a third party, *Skinner v. Railway Labor Executives' Assoc.*, 109 S.Ct. at 1413-16; *National Treasury Employees Union v. Von Raab*, 109 S.Ct. at 1394-95. And, of course, in *Griffin v. Wisconsin*, 483 U.S. at 871, which upheld an exploratory search of a probationer's home, this Court authorized a much more severe intrusion into the home than that contemplated by a cursory security check. On balance then, the minimal intrusion that occurs when police check an arrestee's home for third persons is outweighed by the government's paramount interest in protecting the lives of police officers and others.

4. No objective justification is necessary to conduct a cursory security check because of the danger that inheres in an in-home arrest.

Every time police officers execute an arrest warrant in the home for a violent crime, they should be permitted to conduct a cursory security check of the premises for third persons without a search warrant and without probable cause. Indeed, pursuant to a bright-line rule, they should be allowed to conduct a

security check without any level of objective justification whatsoever.

For obvious reasons, it is impracticable to require police officers to obtain a search warrant based upon probable cause before conducting a cursory security check. When police officers obtain an arrest warrant, they do not then know whether it will be executed in the home. Nor do they know who will be present in the home at the exact moment the warrant is executed. As is true in the on-the-street encounter between a police officer and a citizen, the arrest in the home demands necessarily swift action occasioned by the officer's on-the-spot observations, which by definition cannot be predicted in advance. *Terry*, 392 U.S. at 20.

For these same reasons, and because of the danger that inheres in the in-home arrest for a violent crime, neither probable cause nor any level of objective justification should be required. Officers facing the life-threatening situation of arresting a violent criminal in the home should not be forced to pause and ponder the legal subtleties associated with a quantum of proof analysis. Instead, "[a] single, familiar standard is essential to guide police officers, who have only limited time and expertise to reflect on and balance the social and individual interests involved in the specific circumstances they confront." *New York v. Belton*, 453 U.S. 454, 458 (1981) (quoting *Dunaway v. New York*, 442 U.S. 200, 213-14 (1979)). Accord *New York v. Quarles*, 467 U.S. 649, 659 (1984) (officers must be left free "to follow their legitimate instincts when confronting situations presenting a danger to the public safety"). During the time taken to analyze the

legal ramifications of their conduct, officers could be overpowered, injured, or killed.

In two analogous contexts—the execution of a search warrant in the home and the stop of a vehicle for a traffic violation—this Court has acknowledged that the inherent danger permits police to take limited protective steps without any specific objective justification. An identical conclusion is warranted here. Analytically, the cursory check of a home incident to the execution of an arrest warrant is the mirror image of the warrantless detention found reasonable in *Michigan v. Summers*, 452 U.S. 692 (1981). In *Summers*, the police had a warrant to search a home and, while executing that warrant, detained persons they encountered on the premises. In the context of security checks, police have a warrant to arrest a resident and, while executing that warrant, secure the premises.

Under *Summers*, a separate warrant authorizing the detention of persons is not required because the search warrant “implicitly carries with it the limited authority to detain the occupants of the premises while a proper search is conducted.” 452 U.S. at 705 (footnote omitted). Nor are officers “required to evaluate either the quantum of proof justifying detention or the extent of the intrusion to be imposed by the seizure.” *Id.* at n.19. The reasoning of *Summers* applies with equal force to the cursory protective check of the home attendant to the execution of an arrest warrant for a violent crime. The arrest warrant must carry with it the implicit authority to check for persons who could attack the officers or otherwise interfere with the successful completion of the arrest. And, because any delay only escalates the risk of

violence, the officers must not be required to evaluate the quantum of proof justifying the cursory check.

Pennsylvania v. Mimms, 434 U.S. 106 (1977) (*per curiam*), both bolsters the notion that the police need not evaluate the quantum of proof justifying a cursory security check and provides the principled stopping point for the intrusion that occurs during the check. Under *Mimms*, police officers may order a driver out of his automobile *whenever* the vehicle has been lawfully detained. *Id.* at 111 & n.6. Although the police need no reason for requiring the driver to exit his car, the driver may be subjected to a pat-down only if the police reasonably suspect that he is armed or dangerous. *Id.* at 111-12.

Mimms, like *Summers*, allows police officers to take only that action which is necessary to neutralize the danger that inheres in the situation at hand. That is all that is contemplated by a security check of a home for third persons. If and when the police find a third person on the premises, consonant with *Mimms*, they may not then conduct a pat-down unless they reasonably suspect that the person is armed or otherwise dangerous.

In sum, the danger inherent in the in-home execution of an arrest warrant for a violent crime merits application of a bright-line rule.¹⁰ Should, however,

¹⁰ Although all arrests carry with them the potential for violence, *Washington v. Chrisman*, 455 U.S. at 7, a distinction may logically be drawn between dangerous and non-dangerous crimes, see *Welsh v. Wisconsin*, 466 U.S. 740, 750-51 (1984), and arrests based on warrants and those effectuated without warrants, see *Michigan v. Summers*, 452 U.S. at 705. A bright-line rule adopted here, therefore, would not necessarily cover these other situa-

this Court decline to adopt such a rule in this case, the level of objective justification for a cursory security check should be a reasonable suspicion that there exists a risk of danger to the officers or others at the arrest scene, and not probable cause as required by the Court of Appeals of Maryland. As explained in the next section, the police officers at Buie's home had the requisite articulable suspicion.

C. The limited search of Buie's home falls within the *Terry* doctrine, a well-recognized exception to the warrant and probable cause requirements of the Fourth Amendment.

Although more appropriately analyzed under the general reasonableness balancing test, the cursory security check of Buie's home alternatively falls within the ambit of the *Terry* doctrine, one of the well-defined exceptions to the warrant requirement.¹¹ This doctrine has not been confined to the investigative stop and frisk encounter on the street, but has come to encompass limited searches of places in addition to people.

The *Terry* Court held that a police officer may pat down a detainee on the street if he reasonably suspects that the detainee is concealing a weapon. In *Michigan v. Long*, 463 U.S. 1032 (1983), *Terry* was expanded to include a limited search of the passenger

tions. Any number of circumstances arising in these other types of arrests, of course, would nonetheless permit a cursory search as explained in Section C., *infra*.

¹¹ The overriding concern for officer safety that lies at the core of the security check attendant to an in-home arrest also suggests, as some lower courts have concluded, that the security check is akin to the well-recognized exceptions of exigent circumstances and search incident to arrest. See notes 2 & 3, *supra*.

compartment of an automobile. After seeing a knife in the car of a person who was outside the vehicle but not under arrest, the police "frisked" both the driver and the car. Upholding the limited search of the car, the *Long* Court stated that "*Terry* need not be read as restricting the preventative search to the person of the detained suspect." 463 U.S. at 1047. Read together, *Terry* and *Long* recognize that police officers must be allowed to secure the scene of a police-citizen encounter to protect themselves and others.

For two reasons, police officers who enter a home armed with an arrest warrant for a resident charged with a violent crime face much graver dangers than do police officers on the public street or by the roadside. First, the dangers that confront police officers in a street or automobile encounter are readily visible. In contrast, the very configuration of a house—particularly a multi-level dwelling—prevents the police from discerning how many people are present and where they might be located. Second, the potential for danger is greater because the officers are on the scene to effect an arrest for a completed violent crime, not to determine whether criminal activity, either violent or non-violent, might be afoot.

Because the cursory security check is a classic application of *Terry* and *Long*, officers need only have an articulable suspicion that there exists a risk of danger to themselves or to others. Articulable suspicion, of course, requires only a "minimal level of objective justification." *United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581, 1585 (1989) (quoting *INS v. Delgado*, 466 U.S. 210, 217 (1984)). And, in evaluating whether the requisite articulable suspicion ex-

ists, the test focuses upon the officers' actions "in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation." *Graham v. Connor*, 490 U.S. —, 109 S.Ct. 1865, 1872 (1989). *Accord Maryland v. Macon*, 472 U.S. 463, 470-71 (1985). In some cases, as where the homeowner is being arrested for a violent crime or serious drug offense, the requisite articulable suspicion is supplied by the nature of the crime itself. In other cases, the requisite articulable suspicion may not arise until after the officers have arrived at the arrest scene.

The officers in Buie's home had the necessary articulable suspicion to conduct a security check of the premises. Before they arrived at the scene, the officers had probable cause to believe that Buie had perpetrated a dangerous felony—an armed robbery—a mere two days before. This information alone justified the security check. Moreover, the officers knew that the robber had acted with an accomplice who had not yet been apprehended. And, when the police arrived at the arrest scene, further justification for conducting a protective search presented itself.¹² The officers encountered two young girls at Buie's house. The early stages of their security check did not confirm or dispel the possibility that others were present. Buie's concealing himself in the basement escalated the risk of danger that the police faced. And, when Buie was arrested, the ensuing search of his person did not produce a gun.

¹² Given that articulable suspicion is but a minimal level of objective justification, the additional indicia of danger gave the police full probable cause to believe that there existed a risk of danger to themselves and others at the arrest scene.

Given all of these circumstances, it was imperative that Detective Frolich enter the basement after Buie's arrest to complete the security check of the premises that had begun when police first arrived at the arrest scene. The woman who had answered the telephone call from Detective Frolich's secretary had not been located. Nor had Buie's accomplice Lloyd Allen been found. Additionally, the deadly weapon used in the recent armed robbery had not been recovered. If Detective Frolich had not concluded the security check of Buie's home, the lives of his fellow officers, as well as those of the two young girls at the scene, would have remained in jeopardy. The fact that Frolich discovered a running suit, not a person, did not extinguish the articulable suspicion that he had when he descended the basement stairs.

In short, the security check of Buie's home falls within the ambit of the *Terry* exception to the warrant and probable cause requirements of the Fourth Amendment. The core principles of *Terry*—officer safety and a limited intrusion—are manifested in the cursory check of Buie's home based upon the reasonable suspicion that there was a risk of danger to the officers and others. Like *Terry's* casing of the jewelry store and the knife in Long's automobile, the circumstances confronting the officers at Buie's home demanded that they take the swift and circumscribed action of conducting a limited protective search of the entire premises.

D. Because the cursory security check was lawful Fourth Amendment conduct, the seizure of the red running suit falls within the purview of the plain view doctrine.

Whether the security check of Buie's home is analyzed under the general reasonableness balancing test or under the *Terry* doctrine, Detective Frolich lawfully entered the basement to see if anyone was there. During his limited search to ensure that no one else remained on the premises who could thwart Buie's arrest with violence or otherwise jeopardize the officers' and Buie's safe exit from the scene, Frolich saw the red running suit. The suit was lying on top of a stack of clothing, not buried in a clothes dryer or a drawer. Knowing a witness to the armed robbery had said that one of the robbers wore a red running suit, Frolich had undisputed probable cause to believe that the suit was evidence of Buie's participation in the robbery for which he was being arrested. Of course, Frolich was not then required to shield or avert his eyes. *Arizona v. Hicks*, 480 U.S. 321 (1987); *Texas v. Brown*, 460 U.S. 730 (1983); *Coolidge v. New Hampshire*, 403 U.S. 443 (1971).

CONCLUSION

The Fourth Amendment does not forbid reasonable searches in the home. Nor does it require police officers to disregard their personal safety. Accordingly, Buie can no more hide behind the legitimate protections that the Fourth Amendment affords the home than he could hide forever in his basement from the Prince George's County Police. And, just as Buie's privacy interest in his person yielded to the magistrate's determination to arrest him, Buie's privacy

interest in his home must yield to the minimally intrusive security check, the compelling purpose of which is to ensure police and public safety. To require probable cause to uphold such a walk-through, as did the Court of Appeals of Maryland, is not only unreasonable, it is untenable. The State of Maryland therefore respectfully urges this Court to reverse the judgment of the Court of Appeals of Maryland.

Respectfully submitted,

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July 20, 1989

AMICUS CURIAE

BRIEF

NO. 88-1369

Supreme Court, U.S.
FILED

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JOSEPH F. SPANIOL, JR.,
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1988

STATE OF MARYLAND,
Petitioner,
v.
JEROME EDWARD BUIE,
Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND;
MOTION FOR LEAVE TO FILE
AMICUS CURIAE BRIEF IN SUPPORT OF
THE STATE OF MARYLAND, AND *AMICUS CURIAE*
IN SUPPORT OF THE STATE OF MARYLAND

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STATE OF MARYLAND,

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v.

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Respondent.

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF OF *AMICUS CURIAE*
IN SUPPORT OF
THE STATE OF MARYLAND

Amicus Curiae, the Appellate Committee of the California District Attorneys Association, is filing this brief accompanied by the written consent of all parties to the above-entitled case (see: Rule 36.2, Rules of the Supreme Court of the United States).

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INTEREST OF *AMICUS CURIAE*

The Appellate Committee of the California District Attorneys Association is a committee created by the District Attorneys of the State of California. It has been established in order to utilize and coordinate the resources of District Attorneys throughout the State, for the purpose of presenting their views on behalf of the People of the State of California in cases which may have major statewide impact upon the prosecution of criminal cases. Upon review of the instant matter -- which raises the question of, *e.g.*, the precautions which police officers may lawfully take to preserve their lives -- the Committee has concluded that the outcome of this case shall likely have substantial impact upon the administration of criminal justice throughout California. It is for this reason that the Committee has filed an *amicus curiae* brief herein.

The *amicus curiae* herein addresses but one of the theories by reference to which the Maryland Court of Appeals might be found to have erred. In respect thereto, the *amicus curiae* contends that:

When police officers have lawfully entered a residence for the purpose of effecting the lawful arrest of an occupant, they are entitled to make a reasonably-restricted protective sweep of the premises for the purpose of ensuring the non-presence of persons who might be inclined to assist the arrestee and endanger them. In this regard, we contend that so long as the officers have a rational basis for belief that such action is necessary, they may engage in the protective sweep even in the absence of probable cause therefor.

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SUMMARY OF ARGUMENT

Given that the police officer had no probable cause to enter Mr. Buie's basement "in case there was someone else [there]",¹ the *amicus curiae* nevertheless submits it to be obvious that his action was totally reasonable under the circumstances, and thus notes that *reasonableness* is the essential test of lawfulness under the Fourth Amendment. In respect of the latter point, the *amicus curiae* observes the Fourth Amendment to state in pertinent part that "[t]he right of the people to be secure ... against *unreasonable* searches and seizures, shall not be violated" (emphasis added), and thus notes it to be fundamental that "[t]he ultimate standard set forth in the Fourth Amendment is reasonableness" (*Cady v. Dombrowski*, 413 U.S. 433, 43(1973)). In consequence thereof, it is clear that "[t]he Fourth Amendment is not, of course, a guarantee against *all* searches and seizures, but only against *unreasonable* searches

1. The *amicus curiae* does *not* contend that the officer's authority to enter the basement pertains solely to a search for Mr. Buie's co-robber, the missing Mr. Allen. More specifically, it is contended that the requirement of officer safety would have justified a protective sweep *even if* Mr. Allen had already been in custody. Nevertheless, the possibility that Mr. Allen might have been in the basement adds a further dimension to the incident.

Although the Maryland Court of Appeals has -- by reference to State law -- determined that the officer's testimony "that he had entered the basement specifically '[t]o see if the co-defendant, Mr. Allen, may be in the basement'" may not be considered on appeal (*Buie v. State*, 314 Md. 151, 155 (1988) [n.2]), yet the officer's *unstricken* testimony "that he entered the basement 'in case there was someone else [there]'" (*id.* [text]), is clearly of a breadth sufficient to include Mr. Allen. Thus, in regard to the *amicus curiae*'s view that there was a rational basis for the officer's concern that an additional person might well be concealed in the basement, and that *this person might well seek to rescue Mr. Buie by force*, and observing that this additional person might well have been Mr. Allen, it is noted to be fundamental that "[m]any criminals show loyalty to other members of their group" (Cleckley, *Psychopathic States* in 1 *American Handbook of Psychiatry* [Basic Books, New York, 1959] 567, 574). Given the possibility of such loyalty on the part of the missing Mr. Allen, it was clearly not unreasonable for the police officers to fear that he might attempt the rescue of Mr. Buie.

and seizures" (*United States v. Sharpe*, 470 U.S. 675, 682 (1985)). Accordingly, in light of the fundamental precept "that whether a search and seizure is unreasonable within the meaning of the Fourth Amendment *depends upon the facts and circumstances of each case*" (*Cooper v. California*, 386 U.S. 58 (1967), 59 [emphasis added]; accord, e.g., *Cady v. Dombrowski*, *supra*, 413 U.S. at 440), it is thus that the *amicus curiae* shall address such "facts and circumstances" of this case. More particularly, the *amicus curiae* shall demonstrate the essential reasonableness of the herein-relevant police conduct, considered *vis-a-vis* the inter-relationship of all of the "facts and circumstances" of this case (cf., e.g., *Chimel v. California*, 395 U.S. 752 (1969), 765). Likewise, while the requirement of probable cause clearly exists in certain situations, and while it has been held that it applies herein (see: *Buie v. State*, *supra*, 314 Md. at 159-160 [collecting cases]), the *amicus curiae* shall demonstrate the total impropriety of any rule which requires the existence of probable cause as a pre-condition to such a protective sweep as was performed in the case at bench. More specifically, it is tautological to say -- except, of course, insofar as the Fourth Amendment *ex facie* states that "no Warrants shall issue, but upon probable cause" -- that there exists no figurative mathematical formula by reference to which it may be determined whether or not probable cause should be required in justification of a police officer's conduct in any particular situation. Rather, it must always be a matter of common sense and rational judgment, by force of which the interests of law enforcement and officer safety are considered *vis-a-vis* the constitutional rights of the criminal defendant (cf., e.g., *New York v. Class*, 475 U.S. 106, 116-117 (1986)).

By reference to said standards, the *amicus curiae* contends -- as stated above -- that when a protective sweep is conducted for the purpose of officer safety, while it must of course be founded upon a rational belief that such action is necessary, *it need not be justified by probable cause*. Although

this Court appears to have never before considered this precise proposition, the *amicus curiae*'s view is -- as shall be demonstrated -- amply supported by this Court's prior decisions. In light thereof, it is urged that the forthcoming opinion in this case specifically so hold.

ARGUMENT

Since "whether a search and seizure is unreasonable within the meaning of the Fourth Amendment *depends upon the facts and circumstances of each case*" (*Cooper v. California*, *supra*, 386 U.S. 58, 59 [emphasis added]; accord, e.g., *Cady v. Dombrowski*, *supra*, 413 U.S. at 440) -- the *amicus curiae* adverts to the facts of this case. Mr. Buie was a robber. Having lawfully entered Mr. Buie's residence pursuant to an arrest warrant, the police thus saw him emerge from his apparent hiding place in the basement.² The officer thereupon entered the basement "in case there was someone else [there]." Under such circumstances -- particularly in light of the potentially-violent crime which had been committed (i.e., a robbery), and the felony punishment therefor which Mr. Buie was facing -- there was a rational basis for the police officer's concern that this "someone else" might well be concealed in the basement, and that this other person might well seek to rescue Mr. Buie by force and thus present a significant danger to the officers. More specifically, since "birds of a feather flock together", a police officer could reasonably be concerned that Mr. Buie, who had participated in an armed robbery, might well be in the company of someone else who was likewise armed. Accordingly, there was a rational basis for the police officer's manifest fear that the reasonably-

2. Although the basement was Mr. Buie's apparent hiding place, the *amicus curiae* does *not* contend that the police right to conduct a protective sweep should perforce be limited to that location. Clearly, the right to conduct such a protective sweep applies with equal validity to *any* location in which a person might be hiding.

restricted protective sweep was justified for the limited purpose of precluding this most unwelcome of possibilities.³ In regard thereto, the *amicus curiae* now addresses certain of this Court's previous decisions which support our contention herein.

This Court's decision in *Terry v. Ohio*, 392 U.S. 1 (1968), appears to present a most instructive starting place; more specifically, the philosophy underlying *Terry* has been judicially recognized as assisting in establishment of a police officer's right to conduct an appropriate protective sweep (*see: State v. Toliver*, 5 Wash.App. 321, 326-327 (1971).). Accordingly, the *amicus curiae* adverts to this Court's observation that "there is 'no ready test for determining reasonableness other than by balancing the need to search ... against the invasion which the search ... entails'" (*Terry v. Ohio*, *supra*, 392 U.S. at 21). Accordingly, a reasonable protective sweep is clearly appropriate in light of the fact that "it would be unreasonable to

3. While it might be suggested that the police could merely have continued to maintain a protective watch at the stairway to the basement rather than engaging in a protective sweep, this procedure would have had the potentially-disastrous effect of surrendering the offensive initiative to Mr. Allen or to whoever else might have been in the basement. Additionally, as this Court has observed in respect of an admittedly-different type of search, "we have not required that officers adopt alternative means to ensure their safety in order to avoid the intrusion involved in a *Terry* encounter" (*Michigan v. Long*, 463 U.S. 1032, 1052 (1983) [footnote omitted]). In short, "[c]ourts must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger" (*United States v. Camillo*, 866 F.2d 1071, 1079 (9th Cir., 1988).). In the final analysis, however, the *amicus curiae* observes merely that

"A wise judge engaged in *post hoc* evaluation of police conduct can almost always imagine some alternative means by which the objectives of the police might have been accomplished. But '[t]he fact that the protection of the public might, in the abstract, have been accomplished by 'less intrusive' means does not, itself, render the search unreasonable.' [Citations.] The question is not simply whether some other alternative was available, but whether the police acted unreasonably in failing to recognize or to pursue it." *United States v. Sharpe*, *supra*, 470 U.S. at 686-687.

require that police officers take unnecessary risks in the performance of their duties" (*id.*, at 24), and the fact that "American criminals have a long tradition of armed violence, and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded" (*id.*, at 23). Thus, although the precedent pertains to an admittedly-different factual situation, yet in regard to "the need to search" (*id.*, at 21), this Court has observed that "we cannot blind ourselves to the need for law enforcement officers to protect themselves ... in situations where they may lack probable cause" (*id.*, at 24 [emphasis added]). This being so, it is clear that police officers may lawfully -- even in the absence of probable cause -- take such objectively-reasonable actions (*id.*, at 21-22, 27) as are designed "to neutralize the threat of physical harm" (*id.*, at 24), even when "[t]he officer [is] not ... absolutely certain that the [danger exists]" (*id.*, at 27; *cf. Pennsylvania v. Mimms*, 434 U.S. 106, 109-110 (1977).). More specifically, while it is "generally [true] that searches must be conducted pursuant to a warrant backed by probable cause" (*New York v. Class*, *supra*, 475 U.S. at 117), yet "[w]hen a search ... has as its immediate object a search for a weapon, however, we have struck the balance to allow the weighty interest in the safety of police officers to justify warrantless searches based only on a reasonable suspicion of criminal activity" (*ibid.*). Quite clearly, the identical principle applies when the search is *not merely for the weapon, but is also (as here) for the hand in which the weapon might be held*. Congruently, in respect of the observation that "the police may need to check the entire premises for safety reasons" (*Payton v. New York*, 445 U.S. 573, 589 (1980)), it is observed that "the area into which an arrestee might reach in order to grab a weapon [may], of course, be [searched]" (*Chimel v. California*, *supra*, 395 U.S. at 763).

Therefore, given that a weapon in the hands of a confederate may be equally as deadly as one in the hands of the arrestee, it is thus that "the fundamental principle underlying

[the above-quoted portion of] *Chimel*--that officers have a right to assure their safety--is of general applicability' and thus supports the notion that police may sometimes look elsewhere in the premises to guard against the chance that third parties may offer resistance" (LaFave, 2 *Search and Seizure* [West Publishing Co., St. Paul, 1987], § 6.4(c), page 646 [footnotes omitted]; see: *State v. Toliver*, *supra*, 5 Wash.App. at 324-325; see also: *Jones v. State*, 565 S.W.2d 934, 936-937 (Tex.Crim., 1978).). Moreover, in his discussion of the protective sweep (see: LaFave, 2 *Search and Seizure*, *supra*, § 6.4(c), pages 645-651), Professor LaFave most properly observes that:

"It would make little sense to say that police may take protective measures against those known to be present, but that they may never stray beyond the room of the arrest to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee." *Id.*, at 647.

More specifically, given the existence of that probable cause which had already justified the arrest and the entry into the premises for this purpose, any requirement of further probable cause to justify such restricted police action as would be designed merely to minimize the danger to the police and to the arrestee,⁴ would, quite clearly, serve no valid constitutional purpose. Indeed, all that such an adverse rule would accomplish (see: *State v. Toliver*, *supra*, 5 Wash.App. at 326) is "[the] impair[ment] and even destr[uction] of] the possibility of an arrest at all" (*ibid.*), and/or the unwarranted perpetuation of a reasonably-anticipated danger. Moreover, it is equally certain

4. In writing of "danger to the police and to the arrestee" (emphasis added), the *amicus curiae* addresses the realities of a perilous situation. If the police are fired upon as a response to the arrest (see, e.g., *United States v. Baker*, 577 F.2d 1147, 1152 (4th Circ., 1978)), such gunfire shall necessarily endanger all persons who are in the officers' immediate presence, one of whom is -- invariably-- the arrestee himself.

that "[a] court [which is deciding whether or not an officer has acted lawfully] should take care to consider whether the police are acting in a swiftly developing situation, and in such cases the court should not indulge in unrealistic second-guessing" (*United States v. Sharpe*, *supra*, 470 U.S. at 686; cf. *Terry v. Ohio*, *supra*, 392 U.S. at 28). Thus believing it to be apparent that the rule herein advocated by the *amicus curiae* is not violative of the general principles underlying the Fourth Amendment, we now address the authorities which have considered the specific question here in issue.

Despite authority to the contrary (see: *Buie v. State*, *supra*, 314 Md. at 159-160 [collecting cases]), there remains a substantial body of precedent which is supportive of the *amicus curiae*'s above-stated position. Thus, even in the absence of probable cause to believe that such action is necessary, many of the United States Courts of Appeals have held in substance that "[w]hen officers have [lawfully] arrested a person inside his residence, the exigent circumstances exception permits a [reasonably-restricted] protective search of part or all of the residence when the officers reasonably believe that there might be other persons on the premises who could pose some danger to them" (*United States v. Castillo*, *supra*, 866 F.2d at 1079; accord, e.g., *United States v. Jackson*, 778 F.2d 933, 936-937 (2d Circ., as amended, 1986); *United States v. Marzalkowski*, 669 F.2d 655, 665 (11th Circ., 1982); *United States v. Baker* (4th Circ., 1978) 577 F.2d 1147, 1152), and the same rule is followed in a number of the States (e.g., *Guidi v. Superior Court*, 10 Cal.3d 9-10 (1973); *State v. Miller*, 126 N.J.Super. 572, 574-576 (1974); *Wade v. State*, 627 S.W.2d 777, 779 (Tex.App., 1981); *State v. Toliver*, *supra*, 5 Wash.App. at 326; 327).

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CONCLUSION

In light of the foregoing, the *amicus curiae* respectfully submits that when the police have lawfully entered a residence for the purpose of effecting the lawful arrest of an occupant, they are entitled to make a reasonably-restricted protective sweep of the premises for the purpose of ensuring the non-presence of persons who might be inclined to assist the arrestee and endanger them. In this regard, we contend that so long as the officers have a rational basis for belief that such action is necessary, they may constitutionally engage in the protective sweep *even in the absence of probable cause therefor*. Moreover, the *amicus curiae* submits that the contrary rule furthers neither the Fourth Amendment nor any legitimate public policy consideration; although finding support in some of the cases, it serves no function other than to magnify the already-great peril to police officers, and to increase the criminal defendant's rights beyond those legitimate interests which the Fourth Amendment was designed to protect. Accordingly, we urge

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this Court to recognize the right of police officers to protect themselves, not only against the possibility that an arrestee may lunge for a weapon (*see: Chimel v. California, supra*, 395 U.S. at 763), but also against the possibility that someone else might seek to assist the arrestee by doing so.

Respectfully submitted on behalf of the
 Appellate Committee of the California
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RESPONDENT'S

BRIEF

QUESTION PRESENTED

Does the Fourth Amendment prohibit police, after arresting a suspect in his home, from conducting a protective search of the home where they have no search warrant and no reason to believe other dangerous persons are in the house?

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STATEMENT OF THE CASE

On February 3, 1986, warrants for the arrests of Respondent and Lloyd Allen were issued in connection with an armed robbery of a Godfather's Pizza restaurant. (J.A.9-10). On that same day Prince George's County, Maryland, police began a surveillance of Respondent's house in Riverdale. (J.A.4, 6, 15). Two days later, at about 3:00 or 3:30 p.m. on February 5, five officers entered the house to arrest Respondent. Two other officers remained outside. (J.A.6-7, 10). Before moving in for the arrest, Detective Joseph Frolich had a police secretary call Respondent's home and ask to speak to him in order to obtain "particular knowledge" that he was at home. (J.A.15). The secretary spoke with "a female," also described as "a girl," and with Respondent. (J.A.16). "[T]wo young girls" were "sitting out front" when Frolich entered the house. (J.A.15).

Two detectives were on the main floor of the house and two other officers were on their way upstairs to check the second floor when Corporal Joseph Rozar assumed responsibility for "freezing" the basement. (J.A.4-5, 7). With his service revolver drawn and pointing down the stairs he yelled twice for anyone in the basement to come out. A voice asked who it was. Three times Rozar said, "this is the police, show me your hands." A pair of hands appeared from around the bottom of the stairwell. As instructed, Respondent then came up the stairs keeping his hands exposed. At the top of the stairs Rozar placed him under arrest, searched and handcuffed him. (J.A.5). Rozar saw no need to search the area around Respondent after the arrest. (J.A.8-9). He was not "worried about there being any danger or anything like that[.]" (J.A.9). He saw no one in the house other than Respondent. (J.A.7).

Frolich was standing next to Rozar and observed the arrest, search, and handcuffing of Respondent. (J.A.12-14). Frolich was asked on cross-examination:

"Q What did the officer do with Mr. Buie at that point?

A I don't know.

Q Took him out, whatever. At this point, you decided to go into the basement?

A Yes, sir.

Q Did you know what you were looking for?

A I just went down there in case there was someone else in the basement.

Q You just went down there to see if someone else was down there, to look around?

A Yes, sir." (J.A.14)

On a stack of clothing was a red sweatshirt which Frolich seized. (J.A.14). When asked whether he "ha[d] any reason to believe that anyone else was in the house besides Mr. Buie," Frolich replied, "I had no idea who lived there." (J.A.15).

Defense counsel argued that Frolich had no right to enter Respondent's basement, so that the seizure of the running suit was unconstitutional and its suppression mandated. (J.A.16-18). The prosecutor responded that Frolich entered the basement "to make sure, that no one else [was] there, for their own protection" (J.A.18). In his view, the evidence was properly seized in plain view. (J.A.18). The trial judge ruled:

"THE COURT: I think they had a right to search him and I think they had a right to seize, based on the facts of this case. The man comes out from a base-

ment, the police don't know how many other people are down there. He is charged with a serious offense.

I think the police acted reasonably in this case and if they had gone back to get a warrant, that wouldn't have been there.

Accordingly, the Motion to Suppress is denied." (J.A.19).

SUMMARY OF ARGUMENT

A citizen's right to privacy in his home stands at the very core of the Fourth Amendment. And, as this Court has recognized, the invasion of privacy that accompanies a protective sweep through a house after execution of an arrest warrant is, in reality, little different from that which attends the search of a house pursuant to a search warrant. *Payton v. New York*, 445 U.S. 573, 589 (1980).

Nevertheless, the State of Maryland would eliminate virtually all Fourth Amendment safeguards in cases of this sort, for it would grant the arresting officers an automatic right to sweep through houses in search of dangerous persons even if they have no reason to believe such persons are present. The Solicitor General favors affording minimal Fourth Amendment protection. Advocating application of a *Terry*-type rule, he would permit protective searches when the officers reasonably believe other persons who pose a threat to them are in the house. The right of privacy in the home, however, does not yield to a concern for officer safety on the basis of little or no particularized justification.

A. The proper approach cannot avoid the cardinal principle that a warrantless search, especially of the home, must not be undertaken unless the exigencies of the situation render it objectively reasonable. *Mincey v. Arizona*, 437 U.S. 385 (1978). In the instant case the State

was obliged to show either that, despite a fear of other persons in Respondent's house, exigent circumstances necessitated an immediate entry to effect his arrest; or that an unforeseen danger arose once they were inside. Instead the police, having obtained an arrest warrant two days earlier and having maintained a surveillance of the house since that time, were able to select an advantageous moment for entering the house. After entry, no new facts came to their attention suddenly creating a need for protective action. The evidence simply does not excuse their failure to get a warrant to search for dangerous persons believed to be on the premises.

B. Probable cause is the standard generally applicable to Fourth Amendment intrusions even where circumstances make obtaining a warrant impracticable. It is compromised only when the intrusion is minimal and the interests of law enforcement outweigh the individual's privacy interests. *United States v. Place*, 462 U.S. 696, 703 (1983). A dwelling-place search, especially one permitting entry of unseen parts of the house, is not a minimal intrusion; hence, it requires probable cause. *Arizona v. Hicks*, 480 U.S. 321 (1987). Furthermore, although a concern for safety underlies a number of the exceptions to the warrant requirement, it is never by itself enough to justify relaxing the probable cause requirement for the search of a house.

C. At a minimum, a protective sweep should not be sustained without specific, articulable facts supporting a reasonable belief that persons remain in the house and pose a threat to the officers. A showing of individualized suspicion is unnecessary only in the most exceptional circumstances—as where the intrusion is truly *de minimis* and where other safeguards circumscribe the discretion of the officer in the field. *United States v. Martinez-*

Fuerte, 428 U.S. 543 (1976). Dangerous situations, indeed situations in which a police officer is vulnerable to ambush, are many and varied. If a fear for his safety sufficed to dispense with individualized suspicion, little Fourth Amendment protection would remain.

D. The police in this case had no information reasonably suggesting that dangerous third persons were in the house. The searching officer, when specifically asked whether he had any reason to believe anyone besides Respondent was there, was unable to offer a single reason. (J.A.14). Even the two-day surveillance did not disclose that persons had entered the house and remained there up to the time the police moved in to make the arrest. The fact of a second suspect in the armed robbery is of no import where there is no evidence of his presence in the house.

Though it comes close, the record in this case does not eliminate the possibility that someone was with Respondent in his basement. But that possibility will exist in virtually every case. Reliance on that possibility does not amount to showing a reasonable belief based on specific facts that have been articulated by the searching officers.

ARGUMENT

THE FOURTH AMENDMENT PROHIBITS POLICE, AFTER ARRESTING A SUSPECT IN HIS HOME, FROM CONDUCTING A PROTECTIVE SEARCH OF THE HOME WHERE THEY HAVE NO SEARCH WARRANT AND NO REASON TO BELIEVE OTHER DANGEROUS PERSONS ARE IN THE HOUSE.

A. In The Absence Of Exigent Circumstances, A Protective Search Cannot Be Conducted Without A Warrant.

The validity of a particular search or seizure is determined by balancing its intrusion on the individual's

Fourth Amendment interests against its promotion of legitimate governmental interests. *Skinner v. Railway Labor Executives' Assn.*, 489 U.S. —, 103 L.Ed.2d 639, 661 (1989). Because of a "strong preference for warrants," *United States v. Leon*, 468 U.S. 897, 914 (1984), the balance is ordinarily struck in favor of the procedures set forth in the Fourth Amendment's Warrant Clause. *Skinner*, 103 L.Ed.2d at 661. Thus, according to the "basic rule of Fourth Amendment jurisprudence," *United States v. Ross*, 456 U.S. 798, 824 (1982),

"“searches conducted outside the judicial process, without prior approval by judge or magistrate, are *per se* unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions.”” *Id.* at 825 (citations omitted).

This rule is no less applicable to the search of a residence merely because the police have lawfully gained entrance pursuant to an arrest warrant, *Chimel v. California*, 395 U.S. 752, 763 (1969), or because the invasion of privacy at issue may be less than that of a full-blown search, *United States v. Karo*, 468 U.S. 705 (1984).¹ Nor does it matter that the searching officers are looking for persons rather than objects; absent one of the recognized exceptions, a search warrant is necessary. *Steagald v. United States*, 451 U.S. 204, 213-14 (1981).²

¹ *Karo* prohibits the warrantless monitoring of a beeper inside a house even though its search capabilities are limited to revealing the presence of a particular object at a particular time. *Id.* at 717. As explained in Part B.1., *infra*, a protective sweep is vastly more intrusive; indeed, in many ways it is the equivalent of a complete residential search.

² The Court held in *Steagald* that an arrest warrant for Ricky Lyons did not authorize government officers to enter and search

These exceptions, termed "exigent circumstances," require swift action, so that obtaining a warrant is impracticable. *Terry v. Ohio*, 392 U.S. 1, 20 (1968). To justify a warrantless intrusion, the State bears a heavy burden to show an urgent need for the action taken. *Welsh v. Wisconsin*, 466 U.S. 740, 749-50 (1984); *Vale v. Louisiana*, 399 U.S. 30, 34 (1970).³

Steagald's house in order to execute that warrant. A warrant to search the house for Lyons was necessary to protect Steagald's privacy interests in his home. *Id.* at 213. Despite *Steagald*, the State in this case petitioned for a writ of certiorari proposing, in part, that Detective Frolich was entitled to search Respondent's house for Lloyd Allen in order to execute the warrant for Allen's arrest. (Cert. Pet. 11, 13). In its Brief the State has discarded this contention.

³ The Court has also departed from the usual warrant and probable cause requirements in circumstances presenting "‘special needs’ beyond normal law enforcement." *Griffin v. Wisconsin*, 483 U.S. 868, 873-74 (1987). Typically, these situations are distinguished by a need for close supervision or commercial regulation, *e.g.*, *id.* (search of probationer's home); *New York v. Burger*, 482 U.S. 691 (1987) (search of premises of closely regulated business), by uniform procedures or regulations which largely eliminate the exercise of discretion by searching officials, *e.g.*, *Skinner v. Railroad Labor Executives' Assn.*, *supra* (drug test of employees); *Illinois v. Lafayette*, 462 U.S. 640 (1983) (inventory search); *United States v. Martinez-Fuerte*, 428 U.S. 543 (1976) (fixed checkpoint near national border), or by an absence of effective alternatives to an authority to make warrantless searches, *e.g.*, *O'Connor v. Ortega*, 480 U.S. 709 (1987) (work-related searches of public employees' offices by their supervisors); *New Jersey v. T.L.O.*, 469 U.S. 325 (1985) (search of student's property by school officials), *Bell v. Wolfish*, 441 U.S. 520 (1979) (body cavity searches of prisoners). In contrast, minimizing danger to police officers is a need of law enforcement itself. *See United States v. Place*, 462 U.S. 696, 704 (1983). Moreover, the protections of a warrant are most essential in cases like the instant one in which a citizen's freedom from unauthorized intrusions in his home would otherwise be left to the discretion of "the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States*, 333 U.S. 10, 14 (1948).

The police officers who testified in this case did not say there was an urgent need to enter Respondent's house when they did. Nor has Petitioner suggested any exigent circumstance that prevented the police from applying for a warrant to conduct a protective search before they entered the house. Two days earlier they had obtained the arrest warrant and commenced the surveillance. No explanation is given for why the surveillance could not have been extended for the relatively brief time required to obtain a search warrant. Additionally, the State's present justification for the sweep is based on asserted facts (the armed robbery, the multi-story house, the unrecovered gun, the accomplice at large, the girl in the house with Respondent (Pet. Br. 27-29)) that were known to the police before they entered the house. Once inside, they learned nothing indicating the accomplice or anyone else dangerous was in the house. Since the information on which the police acted was already known to them at a time when there was no need for immediate action, the search was not exempt from the warrant requirement. *United States v. Curzi*, 867 F.2d 36, 39 (1st Cir. 1989); *United States v. Gamble*, 473 F.2d 1274, 1277 (7th Cir. 1973); *State v. Brown*, 289 S.C. 581, 347 S.E.2d 882, 886 (1986). See Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding the Propriety of Searches Conducted Contemporaneously With an Arrest On or Near Private Premises*, 30 Syracuse L. Rev. 973, 1034, 1092 (1979).

B. A Protective Search May Be Undertaken Only When There Is Probable Cause To Believe That Dangerous Persons Remain On The Premises.

Even where circumstances permit dispensing with the warrant requirement, a search ordinarily must be based on probable cause. *National Treasury Employees Union*

v. Von Raab, 489 U.S. ___, 103 L.Ed.2d 685, 703 (1989). Probable cause is "the best compromise that has been found for accommodating [the] often opposing interests in 'safeguard[ing] citizens from rash and unreasonable interferences with privacy' and in 'seek[ing] to give fair leeway for enforcing the law in the community's protection.'" *Dunaway v. New York*, 442 U.S. 200, 208 (1979), quoting *Brinegar v. United States*, 338 U.S. 160, 176 (1949).

There are, of course, instances when the balance is struck in favor of a reduced level of justification. In *United States v. Place*, 462 U.S. 696, 703 (1983), the Court set forth the conditions that may permit a lesser standard:

"When the nature and extent of the detention are minimally intrusive of the individual's Fourth Amendment interests, the opposing law enforcement interests can support a seizure based on less than probable cause."

Place involved a brief seizure of luggage from a suspect. But the analysis for determining the appropriate degree of justification applies to searches and seizures alike since neither necessarily merits less protection than the other. *Arizona v. Hicks*, 480 U.S. 321, 327-28 (1987). Therefore, to avoid the probable cause standard in this case, the State must first establish that protective searches of houses are "minimally intrusive." If it clears that hurdle, it then is obliged to show that its interest in the safety of its officers outweighs the invasion of the individual's right of privacy in his residence.

1. A Protective Sweep Of A Home Is Not A "Minimal Intrusion" On The Right To Privacy.

The house is the only place receiving specific recognition in the text of the Fourth Amendment. It is where one's reasonable expectation of privacy is greatest. Entry

of the home was historically the chief evil against which the Fourth Amendment was directed. *Payton v. New York*, 445 U.S. 573, 585 (1980). This was largely because of what officers of the Crown did after they entered colonists' homes, in particular, exploiting the hated writs of assistance as general warrants to search as they pleased. *Id.* at 583-84, n.21, quoting *Boyd v. United States*, 116 U.S. 616, 625 (1886). Thus, while a lawful entry and arrest necessarily expose parts of a residence to the police, they do not diminish privacy interests in the parts not exposed. As the Court observed in *Chimel v. California*, 395 U.S. 752, 767, n.12 (1969), "we can see no reason why, simply because some interference with an individual's privacy and freedom of movement has lawfully taken place, further intrusions should automatically be allowed despite the absence of a warrant that the Fourth Amendment would otherwise require." See also *Mincey v. Arizona*, 437 U.S. 385, 391 (1978) ("It is one thing to say that one who is legally taken into police custody has a lessened right of privacy in his person. It is quite another to argue that he also has a lessened right of privacy in his entire house." (Citations omitted)).

In attempting to discount the intrusiveness of residential sweeps, the State and the Solicitor General have apparently not considered all that such sweeps bring into view. Police searching for persons must be expected to enter rooms and closets, look into spaces under beds and behind furniture, and open doors, lockers, chests, and wardrobes. Pictures on walls, books, records, and tapes on shelves, magazines and documents on the tops of desks and tables come within the gaze of "sweeping" government officers. Indeed, the Court has recognized that, in practical effect, when a safety check is conducted after execution of an arrest warrant in the home, the intrusion

is comparable to that of a search pursuant to a search warrant:

"It is true that the area that may legally be searched is broader when executing a search warrant than when executing an arrest warrant in the home. The difference may be more theoretical than real, however, because the police may need to check the entire premises for safety reasons, and sometimes they ignore the restrictions on searches incident to arrest." *Payton v. New York*, 445 U.S. at 589 (citation and footnote omitted).

And, when compared to the mere moving of a turntable, a dwelling-place search that requires probable cause, *Arizona v. Hicks*, 480 U.S. 321, 328 (1987), it is clear that a protective search is not remotely a "minimal intrusion" that obviates the higher degree of justification.

2. The State's Interest In The Safety Of Its Officers Does Not Justify Infringing Upon The Right Of Residential Privacy On The Basis Of Any Standard Less Stringent Than Probable Cause.

The community's interest in protecting its police officers is not subject to dispute. It does not, however, have talismanic powers that make the need for probable cause vanish whenever police are operating in potentially dangerous situations. For example, a practical justification for permitting the search or seizure of an object in plain view is that immediate action may spare the officer a risk of danger. *Arizona v. Hicks*, 480 U.S. at 327; *Coolidge v. New Hampshire*, 403 U.S. 443, 467-68 (1971)(plurality opinion). This threat, however, does not entitle the police to search or seize the object without probable cause. *Arizona v. Hicks*, 480 U.S. at 327.

The State argues, in effect, that an exigent circumstance—a perceived threat of danger—justifies dispens-

ing with the warrant and probable cause requirements. But while the need for swift action may excuse the failure to get a warrant, it does not permit a residential search without probable cause. For example, an officer in hot pursuit of an armed robber may, without a warrant, enter a house to make an arrest and search it for weapons as long as he has probable cause to believe the robber entered the house. *United States v. Santana*, 427 U.S. 38, 42 (1976). Similarly, under the so-called "emergency doctrine," police may search a residence for someone in need of immediate assistance if they have probable cause, *United States v. Booth*, 455 A.2d 1351, 1355-56 (D.C. App. 1983); *State v. Beede*, 119 N.H. 620, 406 A.2d 125, 130 (1979), *cert. denied*, 445 U.S. 967 (1980); *State v. Bridewell*, 306 Or. 231, 759 P.2d 1054, 1057 (1988); or "some reasonable basis, approximating probable cause, to associate the emergency with the area or place to be searched." *People v. Mitchell*, 39 N.Y.2d 173, 383 N.Y.S.2d 246, 347 N.E.2d 607, 609, *cert. denied*, 426 U.S. 953 (1976); *Gallmeyer v. State*, 640 P.2d 837 (Alaska App. 1982); *State v. Fisher*, 141 Ariz. 227, 686 P.2d 750 (1984).⁴

⁴ In its Brief Petitioner asserts that concern for the safety of others motivated and justified Detective Frolich's entry of Respondent's basement. (Pet. Br. 15). This rationale was not advanced in the courts below; nor was it mentioned in the petition for writ of certiorari. Thus, Petitioner is now barred from raising this claim before the Court. *Steagald v. United States*, 451 U.S. 204, 208-11 (1981); Sup. Ct. R. 34.1 (a). In any event, the record contains no suggestion of or support for such a concern—perhaps because the State and its officers did not conceive of it in the trial court.

Curiously, Petitioner has followed a different course with respect to another claimed exigency. It sought this Court's review claiming, in part, that Detective Frolich was entitled to enter Respondent's basement to seek out persons who would destroy evidence. (Cert. Pet. 13). It has now abandoned this contention. See n. 2, *supra*. In any

Assuming *arguendo* that some situations may justify a protective search, there is no basis for giving any such exigency preferential treatment. Following an in-home arrest police may search the home only if they have probable cause to believe that one or more persons who pose a threat to their safety are inside.⁵

In this case not even the reasonable suspicion standard is met, *see Part C., infra*; necessarily, then, the police lacked probable cause as well.

C. Assuming *Arguendo* That Probable Cause Is Not Required, A Protective Sweep Must Be Justified By A Reasonable, Particularized Belief That Dangerous Persons Remain In The House.

Petitioner favors a sweeping rule indeed—that every time police execute an arrest warrant in the home for a violent crime "they should be allowed to conduct a security check without any level of objective justification whatsoever." (Pet. Br. 22-23). The State, in other words, finds

event, that particular exigency requires, in conformity with the others, probable cause to believe there are persons within the residence who would destroy evidence. *United States v. Gerry*, 845 F. 2d 34, 36-37 (1st Cir. 1988); *United States v. Hicks*, 752 F.2d 379, 388 (9th Cir. 1985).

⁵ For cases applying a probable cause standard, *see United States v. Curzi*, 867 F.2d 36, 41 (1st Cir. 1989); *United States v. Sellers*, 520 F.2d 1281, 1284 (4th Cir. 1975); *United States v. Kolodziej*, 706 F.2d 590, 597 (5th Cir. 1983); *United States v. Morgan*, 743 F.2d 1158, 1163 (6th Cir. 1984) (government must show "serious and demonstrable potentiality for danger," *quoting Kolodziej, supra*); *State v. McCleary*, 116 Ariz. 244, 568 P.2d 1142, 1144 (Ariz. App. 1977); *Dillon v. Superior Court*, 7 Cal. 3d 305, 102 Cal. Rptr. 161, 497 P.2d 505, 511 (1972) (en banc); *State v. Huff*, 220 Kan. 162, 551 P.2d 880, 885-86 (1976); *Commonwealth v. Elliott*, 714 S.W.2d 494, 496 (Ky. App. 1986); *Buie v. State*, 314 Md. 151, 550 A.2d 79, 83 (1988).

such protective sweeps *per se* reasonable. It seeks to bring this case not only under an exemption from the warrant and probable cause requirements, but also within the much smaller subclass of cases that do not even call for individualized suspicion. It offers two unexceptional grounds for its proposed exception: that danger inheres in such police action, and that a "bright-line rule" is easier to apply. (Pet. Br. 23-25).

Terry and Sibron v. New York, 392 U.S. 40 (1968), dispel the notion that a police officer's fear for his safety automatically eliminates the need for individualized suspicion. Once an officer has lawfully made an investigatory stop, he may conduct a self-protective search for weapons only if he can "point to particular facts from which he reasonably inferred that the individual was armed and dangerous." *Id.* at 64. An equivalent standard applies to a protective search of the passenger compartment of an automobile despite the lesser expectation of privacy associated with vehicles. *Michigan v. Long*, 463 U.S. 1032 (1983).

The State, however, seeks a special rule for arrests of allegedly violent suspects in private residences. It perceives an enhanced danger in these situations due to possible surprise attacks from incensed spouses or other persons lurking in other rooms. (Pet. Br. 15). But attacks of this sort are equally plausible in other circumstances. For instance, in the case of a sidewalk arrest an attack may always be launched from behind the door or window of a nearby house or business.

The State has cited no statistical or historical evidence that officers inside residences are especially susceptible to ambush. In fact, one study tends to show the contrary. Meyer, Magedanz, Dahlin, & Chapman, *A Comparative*

Assessment of Assault Incidents: Robbery-Related, Ambush, and General Police Assaults, 9 J. Police Sci. & Admin. 1 (1981), collected data on police assaults in five south central states in the early 1970's. *Id.* at 2. The assaults were classified according to type: general (unplanned attacks arising out of heated, emotional situations with much opportunity for interaction and communication between officer and assailant before the attack), robbery-related (attacks developing from sudden confrontations between police and offender in robbery situations), and ambush (sudden surprise attacks with no advance interaction between officer and assailant). *Id.* at 3. These were further classified according to other variables including the location of the assault. Table 2, *id.* at 4, shows that of 264 assaults in private residences, 259 (98.1%) were general, 2 (0.7%) were robbery-related, and 3 (1.1%) were ambushes. The data do not show whether any of those three ambushes was a confederate's surprise attack meant to foil an arrest. It is clear, however, that if a police officer can expect to be assaulted in a private home, it is not likely to be by the kind of ambush that a protective sweep is intended to prevent. There is simply no objective support for a heightened sense of danger in these situations.⁶

Petitioner's police protection argument, like the claim that a full-blown search of a house after an arrest is inherently reasonable, "is founded on little more than a subjective view regarding the acceptability of certain

⁶ A second premise on which the State's position depends, that arrests for violent crimes necessarily carry a greater potential for danger, has already been rejected by the Court. "The danger to the police officer flows from the fact of the arrest, and its attendant proximity, stress and uncertainty, and not from the grounds for arrest." *United States v. Robinson*, 414 U.S. 218, 234, n.5 (1973).

sorts of police conduct, and not on considerations relevant to Fourth Amendment interests." *Chimel v. California*, 395 U.S. at 764-65.

Nor has the State demonstrated a need for a "bright-line rule." In *New York v. Belton*, 453 U.S. 454 (1981), the Court confronted the question of the permissible scope of a search incident to the arrest of a recent occupant of a car. It acknowledged the difficulties lower courts were having in adapting *Chimel* principles to these cases. The courts had found no workable definition of "the area within the immediate control of the arrestee" when that area may include the interior of a car. The cases suggested to the Court that articles inside the passenger compartment were generally, if not inevitably, within the arrestee's control. Accordingly, it held that incident to the arrest police may search the passenger compartment and containers found there. *Id.* at 459-60.

The courts have experienced no comparable difficulty in settling upon the appropriate scope of a protective search of a house. Nor can it be said that other dangerous persons generally occupy a residence whenever police make an in-home arrest. Rather, as Petitioner has indicated, the conflict has been primarily over which level of objective justification is best suited to a protective search of a house. (Cert. Pet. 13-16). The State would have the Court resolve the dispute over the probable cause and reasonable suspicion standards by requiring no quantum of justification at all—the logical equivalent of a school principal awarding a student a grade of C because his teacher was having difficulty in deciding whether he deserved an A or a B.

The argument (Pet. Br. 23-24) that police should not be expected to "reflect" and "balance" in a protective sweep

situation is equally unconvincing. Police routinely find themselves in dangerous situations, yet unable to act until they have probable cause or reasonable suspicion. The former standard is familiar, simple, and clear to law enforcement officers, *Dunaway v. New York*, 442 U.S. 200, 213 (1979); the latter, also "one of the relatively simple concepts embodied in the Fourth Amendment." *United States v. Sokolow*, 490 U.S. ___, 104 L.Ed.2d 1, 10 (1989). There is no reason why police should have particular difficulty in measuring their information against either of these standards after making an in-home arrest.

The "demand for specificity in the information upon which police action is predicated is the central teaching of this Court's Fourth Amendment jurisprudence." *Terry v. Ohio*, 392 U.S. 1, 21, n.18 (1968). Accordingly, "some quantum of individualized suspicion is usually a prerequisite to a constitutional search or seizure." *United States v. Martinez-Fuerte*, 428 U.S. 543, 560 (1976)(footnote omitted). A case-by-case assessment of reasonableness is unnecessary only in cases of minimal intrusions that serve special governmental needs beyond the normal needs of law enforcement, where other safeguards assure that the individual's reasonable expectation of privacy is not subject to the discretion of the officer in the field, or where it is impracticable to require some level of individualized suspicion. *National Treasury Employees Union v. Von Raab*, 489 U.S. ___, 103 L.Ed.2d 685, 702 (1989); *Delaware v. Prouse*, 440 U.S. 648, 654-55 (1979).⁷

⁷ For examples, see *Skinner v. Railway Labor Executives' Union*, *New York v. Burger*, *Illinois v. Lafayette*, *Bell v. Wolfish*, and *United States v. Martinez-Fuerte*, all cited in n.3, *supra*.

In espousing the *per se* reasonable approach, the State attempts to analogize this case to *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam), and *Michigan v. Summers*, 452 U.S. 692 (1981). Both are easily distinguished. *Mimms* allows officers who have lawfully stopped a vehicle to order the driver to step out of the car regardless of any fear of danger. Because the driver is being asked to expose very little more of his person than was already exposed, the Court described this additional intrusion as "*de minimis*" and "at most a mere inconvenience." 434 U.S. at 111. It hardly approximates the privacy invasion that attends a protective sweep through a house.

In *Summers*, the Court held that a warrant to search a house for contraband carries with it the limited authority to detain its occupants until the search is completed. 452 U.S. at 705. "[T]he detention represents only an incremental intrusion on personal liberty." *Id.* at 703. The existence of the search warrant, which implies a judicial "determin[ation] that police have probable cause to believe someone in the home is committing a crime[.]" justifies the detention. *Id.* Its intrusiveness is further reduced by the preference of most detainees to remain present in order to monitor the search of their possessions. *Id.* at 701. Also considered significant was the lack of an incentive for police to exploit the detention since the search rather than the detention would normally provide whatever information they might be seeking. *Id.*

None of these features finds a parallel in the instant case. For the reasons set forth in Part B.1., *supra*, a sweep through a house cannot realistically be considered "incremental." And, since the issuance of an arrest warrant does not provide probable cause to believe (or even a reasonable suspicion) that dangerous third persons are in the arrestee's house, unlike *Summers*, the judicial finding

in this case that the initial intrusion was warranted does not itself imply probable cause to make the ensuing warrantless intrusion. Also unlike *Summers*, most arrestees are not likely to welcome the second intrusion. Lastly, sweeps are undeniably susceptible to exploitation. See *Payton v. New York*, 445 U.S. at 589 (noting that police sometimes ignore restrictions on searches). Indeed, an automatic right to conduct a sweep would encourage police to exploit the arrest warrant itself. The windfall potentially obtainable by arranging to execute the warrant in the home would not escape police attention. See *Steagald v. United States*, 451 U.S. 204, 215 (1981) (arrest warrant may serve as pretext for entry of home). *Summers* is the "mirror image" of this case (Pet. Br. 24) only to the extent that right equals left.⁸

This Court has stated that, after entering a home and executing an arrest warrant, "police *may* need to check the entire premises for safety reasons[.]" *Payton v. New York*, 445 U.S. at 589 (emphasis added). This recognition that there is no inherent need for a protective search implies that some degree of individualized suspicion, "reasonable suspicion" at a minimum, is necessary.⁹

⁸ *Ybarra v. Illinois*, 444 U.S. 85 (1979), also involved a warrantless search ostensibly in support of a judicially authorized action. Police had obtained a warrant to search a bar and the bartender. After entering, they proceeded to frisk Ybarra (and other patrons) for weapons. The search was held to be invalid in the absence of a reasonable belief, directed at the person to be frisked, that he was armed and presently dangerous. *Id.* at 92-94. By analogy, the arrest warrant in the instant case did not eliminate the need for at least a reasonable belief that the particular place to be searched, Respondent's basement, presently held a threat of danger.

⁹ For cases requiring a reasonable belief that other persons who are dangerous are on the premises or a similar *Terry*-type standard, see

D. The Police Did Not Have A Reasonable Belief That Other Persons Remained In The Basement Who Posed A Threat To Police Safety; Consequently, The Protective Search Of Respondent's Basement And The Seizure Of Evidence There Violated The Fourth Amendment.

At the *Terry* level of justification, "[a] court sitting to determine the existence of reasonable suspicion must require the agent to articulate the factors leading to that conclusion[.]" *United States v. Sokolow*, 490 U.S. —, 104 L.Ed.2d 1, 12 (1989). Thus, the officers who testified in this case were obliged to provide specific facts capable of supporting a reasonable belief that one or more persons remained in the basement after Respondent was arrested and that those persons were dangerous.

But Detective Frolich admitted that he had no such facts. Defense counsel, after establishing that two girls were outside the house, went to the heart of the case with the question, "Did you have any reason to believe that anyone else was in the house besides Mr. Buie?" (J.A. 15). The detective could not have had a better opportunity to recite the specific information that led him to suspect that someone, dangerous or not, remained in the house. His response, "I had no idea who lived there," (J.A. 15) revealed that he had none.

The conclusion to be drawn from this testimony is that the police had no basis for believing anyone else, much

United States v. Escobar, 805 F.2d 68, 71 (2d Cir. 1986); *United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982); *United States v. Delgadillo-Velasquez*, 856 F.2d 1292, 1298 (9th Cir. 1988); *United States v. Owens*, 782 F.2d 146, 151 (10th Cir. 1986); *United States v. Burgos*, 720 F.2d 1520, 1526 (11th Cir. 1983); *Klosieski v. State*, 483 So.2d 448, 450 (Fla. App.), *review denied*, 491 So.2d 281 (Fla. 1986); *Pope v. State*, 635 S.W.2d 815, 818 (Tex. App. 1982); *Brown v. State*, 738 P.2d 1092, 1095 (Wyo. 1987).

less a suspected accomplice, was in the basement. Indeed, the added fact of a two-day surveillance should have led to the opposite determination: with no reported sightings of persons entering but not leaving the house, police should have concluded that no one was with Respondent. See *Klosieski v. State*, 482 So.2d 448, 450 (Fla. App.), *review denied*, 491 So.2d 281 (Fla. 1986); *State v. Skaff*, 450 So.2d 896, 897 (Fla. App. 1984); *Brown v. State*, 738 P.2d 1092, 1095 (Wyo. 1987).

In assessing whether or not there was a reasonable suspicion of dangerous persons on the premises, it is useful to examine whether the testifying officers actually held such fears. When police are seeking judicial approval of a warrantless search and particularly when they are operating under an exception not previously recognized by the state's courts, one would expect them to specify the reason for the search. The testimony of the two veteran officers in this case (one had reached the rank of corporal; the other, detective (J.A. 3, 9)) does not reflect the state of mind Petitioner now ascribes to them;¹⁰ it is fair, therefore, to infer that the circumstances would not evoke a self-protective motivation in a reasonable mind.

¹⁰ In earlier appellate litigation of this case the State itself denied that Detective Frolich had a protective purpose. Court of Special Appeals of Maryland, No. 100, September Term, 1987, Brief of Appellee 2, 5. In addition, the trial judge rejected the argument that police protection was the officer's concern. In denying the motion to suppress, he commented upon the officers' ignorance of the number of people in the basement and the likelihood that the object seized would not have been there when the officers returned from getting a warrant. (J.A. 19). The judge apparently interpreted Frolich's explanations for the entry, "in case there was someone else in the basement" and "to look around" (J.A. 14), as reflecting a concern that someone would destroy evidence. As previously noted, *see* n.4, *supra*, Petitioner does not now advance this rationale.

Neither officer testified that police protection was the purpose of Frolich's entry of the basement. Corporal Rozar admitted that after Respondent was in custody, he "w[as]n't worried about there being any danger or anything like that[.]" (J.A.9). Frolich did not dispute that Rozar had taken Respondent out of the house before Frolich decided to go into the basement. (J.A.14). At that point, with the arrestee in custody, an officer actually fearful of someone lying in wait would not have needlessly exposed himself to the danger. Prudence would have dictated a prompt departure from the premises. *Klosieski v. State*, 482 So.2d at 450; *State v. Ranker*, 343 So.2d 189, 195 (La.1977); *State v. Monzu*, 227 Neb. 902, 420 N.W.2d 726, 727 (1988). It is also significant that Frolich never testified that he descended the basement stairs with his gun drawn, a fact he should be expected to recall if he were trying to articulate a concern for his safety. In sum, the absence of an actual suspicion of danger on the part of the officers on the scene leaves the claim of a reasonable suspicion unconvincing.¹¹

¹¹ The absence of an actual fear of danger undermines the State's case regardless of whether the record adequately shows that a fear of danger would have been reasonable. To sustain the search, the State must establish its true character and meet the standard of proof applicable to such a search. See *Colorado v. Bertine*, 479 U.S. 367, 371-72 (1987) (suspicionless inventory search upheld but probable cause necessary if actual purpose had been investigative); *O'Connor v. Ortega*, 480 U.S. 709, 729 (1987) (plurality opinion) (42 U.S.C. § 1983 action alleging illegal search and seizure remanded so that actual justification for search could be determined and standard appropriate thereto applied); and *Sibron v. New York*, 392 U.S. 40, 64 (1968) (invalidating search undertaken for investigative rather than self-protective purpose). Accordingly, if, as the trial judge found, see n.10, *supra*, Detective Frolich entered Respondent's basement to insure preservation of evidence, the record must show that fact, as well as probable cause to believe persons there would destroy the evidence. See n.4, *supra*. By claiming that Frolich actually had a protective purpose, which was not supported by the record, the State has not carried its burden.

The party seeking to justify the search must demonstrate the factual basis for it in the record. *Beck v. Ohio*, 379 U.S. 89 (1964). In an effort to sustain this burden, the State and the Solicitor General rely upon six "facts." Closer examination discloses that some of them were not proven and none of them is probative of the matter at hand.

1. *The alleged accomplice.* The only mention of a second suspect at the pretrial suppression hearing came in response to questions seeking the names of the suspects for whom arrest warrants were obtained. (J.A.10). The officers never stated that they had Lloyd Allen in mind while executing their duties inside Respondent's house. Nor did the prosecutor refer to him in order to explain the need for a protective search. (J.A.18). Furthermore, no evidence was produced, and no factual finding made, as to his whereabouts. The officers were obliged to articulate facts which led them specifically to believe that Allen was in Respondent's house, not generally at large.¹² See *United States v. Carter*, 173 U.S. App. D.C. 54, 522 F.2d 666, 675-76 (1975). *United States v. Kolodziej*, 706 F.2d 590, 597 (5th Cir. 1983); *Pope v. State*, 635 S.W.2d 815, 818 (Tex. App. 1982).

2. *The girl who answered the phone.* The police never testified that they feared the girl (also described as a "female" (J.A.16)) who answered the police secretary's

¹² In fact, the State failed even to prove that Allen was at large. That a warrant had been issued for his arrest on February 3 says nothing about whether or not it had been executed by the afternoon of February 5. Nevertheless, the Court of Appeals of Maryland appears to make the assumption that Lloyd Allen was "on the loose" that afternoon. (Cert. Pet. App. 15, n.4). Recital of a "fact" in an appellate opinion is not the equivalent of a finding in the trial court. *Beck v. Ohio*, 379 U.S. at 93.

phone call. And throughout the prior litigation of this issue, at both the trial and appellate levels, the State has not cited her as a reason to believe the police were in danger in the house. Consequently, at this stage of the case her presence is entitled to no weight as justification for the search. See *United States v. Brignoni-Ponce*, 422 U.S. 873, 886, n.11 (1975) (Court will not consider "after-the-fact justification" for car stop in deciding whether officers had reasonable belief that it held illegal aliens). Even if properly before the Court, the fact is inconsequential. The record fairly suggests that she was one of the girls outside the house when the police entered. In any event, there is no evidence to suggest an inclination on her part to attack the police or a capacity to pose a serious threat. See *United States v. Owens*, 782 F.2d 146, 151 (10th Cir. 1986), and *People v. Glasspoole*, 48 Cal. App. 3d 668, 121 Cal. Rptr. 736, 742, n.9 (1975), both requiring some indication that third parties believed to be on the premises were also believed to be dangerous.

3. *The delay in responding to Rozar's call.* After Corporal Rozar's second call into the basement Respondent asked who it was. Rozar said "this is the police" three times, and then Respondent came up the stairs. (J.A.5). It is now "conceivable" to the State that a scheme to thwart the arrest was being hatched during the delay. (Pet. Br. 17). The State was not so inventive prior to this stage of the proceedings; hence, this explanation for its officer's action cannot be given weight. *United States v. Brignoni-Ponce*, 422 U.S. at 886, n.11. If Detective Frolich had presented such an "inchoate and unparticularized suspicion or 'hunch'" to the trial court, it would even then have properly received no consideration. *Terry v. Ohio*, 392 U.S. 1, 27 (1968).¹³

¹³ If Respondent had appeared promptly at the bottom of the

4. *The gun.* According to the suppression hearing record, Respondent was suspected of committing an "armed robbery" (J.A.9-10), which is more precisely denominated "robbery with a dangerous or deadly weapon." Maryland Code (1957, 1987 Repl. Vol.), Art. 27, § 488. The record does not show the kind of dangerous or deadly weapon used. Under state law it may have been anything used or designed to be used in destroying, defeating or injuring an enemy, anything designed as an instrument of offensive combat, anything immediately useable, under the circumstances of the case, to inflict serious or deadly harm (*e.g.*, anything useable as a bludgeon), or anything actually used in a way likely to inflict that sort of harm (*e.g.*, a microphone cord used as a garrote). *Brooks v. State*, 314 Md. 585, 600, 552 A.2d 872 (1989) (citation and footnote omitted). One simply cannot assume that "armed robbery" means that a gun was used. Furthermore, there is no showing that the weapon had not been recovered prior to Respondent's arrest.

5. *The nature of the charge.* As previously noted, the Court has been unwilling to assume that the degree of danger to an arresting officer depends on the particular crime for which the arrest is made. *United States v. Robinson*, 414 U.S. at 234. While this observation was made in the context of danger from the arrestee, the connection between the charge and danger from third parties in the arrestee's house is even more tenuous. Especially in the absence of any indication that other

stairs, the State no doubt would have "conceived" that he responded quickly because a delay might have prompted the police to enter the basement and thereby discover his confederates. Under this hypothesis, Respondent's quick surrender would have enhanced his confederates' ability to thwart the arrest. On this record, then, the length of the delay implies nothing.

persons were in Respondent's house, the fact that he was arrested for armed robbery contributes nothing to a reasonable suspicion of danger.

6. *The multi-level dwelling.* While the structure of a house may, in appropriate circumstances, broaden the scope of an otherwise justified protective search, it is a *non sequitur* to say that a multi-level house enhances the likelihood that dangerous persons are inside. As with the arguments concerning the gun and the nature of the charge, the size of the dwelling is immaterial without some independent reason to believe that danger lurks there.

Considered in its entirety, the record makes clear why Detective Frolich had no basis for believing and in fact did not believe that anyone, much less anyone dangerous, was in the house with Respondent. The most the State can show is a lack of certainty that Respondent was alone in the house. But a "mere possibility" that others were there, *United States v. Cooks*, 493 F.2d 668, 672 (7th Cir. 1974); *Dillon v. Superior Court*, 7 Cal.3d 305, 102 Cal. Rptr. 161, 497 P.2d 505, 511 (1972) (en banc); *Pope v. State*, 635 S.W.2d at 818, and "an officer's general fear of the unknown," *City of Athens v. Wolf*, 38 Ohio St.2d 237, 313 N.E.2d 405, 409 (1974), do not amount to an objectively reasonable, individualized suspicion.

Because the State's evidence does not meet either the probable cause or the reasonable suspicion standard, Detective Frolich's entry of Respondent's basement, which brought him within plain view of the running suit, was unlawful, and the running suit should not have been admitted into evidence. *Arizona v. Hicks*, 480 U.S. 321, 326 (1987).

CONCLUSION

For the foregoing reasons the judgment of the Court of Appeals of Maryland should be affirmed.

Respectfully submitted,

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REPLY

BRIEF

No. 88-1369

Supreme Court, U.S.

FILED

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

STATE OF MARYLAND,

Petitioner,

v.

JEROME EDWARD BUIE,

Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS OF MARYLAND

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT

I. THE SECURITY CHECK CONDUCTED IN THIS CASE
 WAS REASONABLE FOURTH AMENDMENT CONDUCT.

Respondent Buie acknowledges that "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause requirement impracticable,'" *Skinner v. Railway Labor Executives' Assoc.*, 489 U.S. ___, 109 S.Ct. 1402, 1414 (1989) (citations omitted), this Court has made exceptions to these traditional Fourth Amendment prerequisites. (Br. 7 n.3). He nonetheless contends that "minimizing danger to police officers is a need of law enforcement itself" and therefore cannot justify dispensing with a warrant and probable cause. (Br. 7 n.3).

Buie's argument cannot be squared with this Court's decisions in *Terry v. Ohio*, 392 U.S. 1 (1968), and *Michigan v. Long*, 463 U.S. 1032 (1983). In each of these cases, the Court upheld warrantless searches, conducted in the absence of probable cause, in part because of the "immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Terry*, 392 U.S. at 23. More generally, the Court consistently has identified officer safety as a compelling factor bearing on the reasonableness of a search or seizure. See, e.g., *Michigan v. Summers*, 452 U.S. 692, 702 (1981) (police officers may briefly detain the occupant of a house during the execution of a search warrant, because of "the interest in minimizing the risk of harm to the officers"); *Pennsylvania v. Mimms*, 434 U.S. 106, 110 (1977) (per curiam) (in upholding as reasonable an order directing a driver stopped by the police to get out of his car, the Court found it "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty").

Buie's argument also overlooks the fact that the security check at issue is intended to protect not only the arresting officers but all other persons at the arrest scene.¹ This compelling need to protect all hu-

¹ To justify his having ignored the fact that a security check is intended to protect every person at the arrest scene, Buie asserts that the State is precluded from relying on "safety of others" as a justification for the check because this particular rationale was not advanced in the courts below or in the State's petition for writ of certiorari. (Br. 12 n.4). Buie's argument fails for the simple reason that the State is not pressing a new legal

man life is without doubt a special need beyond mere law enforcement. And, as pointed out in the State's principal brief at 18-19, this interest is as, or more, compelling than the special needs recognized by the Court in its prior decisions.

Apparently taking his lead from the Court of Appeals of Maryland, Buie contends that the police needed a search warrant or exigent circumstances before they could conduct the protective check of his home. (Br. 7-8). He also defends the probable cause standard adopted by Maryland's high court because, as he puts it, "[e]ntry of the home was historically the chief evil against which the Fourth Amendment was directed." (Br. 9-10). In so arguing, Buie, as did the majority below, ignores the obvious: when the police entered Buie's home, they were acting pursuant to an arrest warrant that entitled them not only to cross the threshold but to search for Buie in any place he might be found. Indeed, until the moment of Buie's arrest, the police could have gone into the basement to find him and, at that time, discovered the red running suit. Because Buie's expectation of privacy was substantially compromised by the underlying warrant—and by the authority to search that the warrant conveyed—the continuation of the secu-

theory, but is merely acknowledging the logical, factual nexus between officer safety and the safety of others during an in-home arrest. Cf. *New York v. Quarles*, 467 U.S. 649, 656 (1984) (during apprehension of criminal suspect, police act out of a host of different motives, including their own safety and the safety of others). And, given that the State has consistently argued that the cursory check of the homeowner-arrestee's premises is reasonable Fourth Amendment conduct, the safety-of-others rationale is properly before the Court. See *Canton v. Harris*, 489 U.S. —, 109 S.Ct. 1197, 1202-03 (1989).

rity check of the premises after Buie was located was "only an incremental intrusion on personal liberty." *Michigan v. Summers*, 452 U.S. at 703.

Relying on *Payton v. New York*, 445 U.S. 573 (1980), Buie contends that a security check for persons may prove to be as intrusive as a full-scale search for evidence pursuant to a search warrant. (Br. 10-11). Accordingly, he reasons, a security check should not be permissible when the officers have only the authority conferred by an arrest warrant. Logic does not support the proposition that a check of the premises for persons is as intrusive as a general rummaging through the drawers and books of the arrestee. *Payton* does not support Buie's proposition either. To be sure, the Court explained in *Payton* that in executing an arrest warrant "the police may need to check the entire premises for safety reasons." *Id.* at 589. But the Court did not suggest that the police must therefore have a search warrant before conducting a safety check. Rather, the holding in *Payton* is precisely the opposite: although "an arrest warrant requirement may afford less protection than a search warrant requirement," an arrest warrant is nevertheless sufficient to require a suspect "to open his doors to the officers of the law." *Id.* at 602-03. This is so even though, as a practical matter, the suspect's home may be exposed to a thorough "safety check."²

² Relying on *Arizona v. Hicks*, 480 U.S. 321 (1987), Buie contends that an interest in self-protection does not entitle the police to conduct a security check on less than probable cause. (Br. 11). *Hicks* simply did not address this question. In *Hicks*, the Court held that the police could not examine concealed parts of a stereo system that they had found in plain view during a search, conducted on exigent circumstances, following a shooting

Buie also argues that officer safety alone cannot justify adoption of a *per se* rule permitting a cursory security check of the home whenever police make an in-home arrest of the homeowner. (Br. 13-19). But the Court has employed precisely this justification, in part at least, for permitting a routine, thorough search of the arrestee and the area surrounding him. *Chimel v. California*, 395 U.S. 752, 763 (1969). See also *New York v. Belton*, 453 U.S. 454 (1981) (applying *Chimel* rule to permit entire search of passenger area of the car as an adjunct to the arrest of the driver); *United States v. Robinson*, 414 U.S. 218 (1973) (full search of person attendant to arrest for traffic violation). In still other cases the Court has relied on officer safety in authorizing police, as a routine matter, to detain persons during the course of other legitimate police action. *Michigan v. Summers*, 452 U.S. at 705; *Pennsylvania v. Mimms*, 434 U.S. at 111. Because the inherent volatility of an in-home arrest, *Washington v. Chrisman*, 455 U.S. 1, 7 (1982), is exacerbated when third persons are present at the scene, a *per se* rule prescribing the scope of a lawful security check is even more appropriate and necessary than in the *Chimel*, *Belton*, *Robinson*, *Summers*, and *Mimms* scenarios.

II. OFFICER CONDUCT IS TO BE JUDGED BY AN OBJECTIVE STANDARD.

Buie contends that at the time of the security check, the police officers did not have a reasonable belief that they were at risk. (Br. 20-26). In reaching this conclusion, Buie finds it "useful to examine whether the testifying officers actually held such fears." (Br.

incident. There was no evidence in *Hicks* that the stereo presented a threat to the officers' safety.

21). Because, in his view, Officers Frolich and Rozar did not testify to an "actual suspicion of danger on [their] part," Buie concludes that the security check cannot be justified. (Br. 22). Assuming the Court finds it necessary to reach the issue, Buie's argument should be rejected because it misstates both the law and the record.

Reasonable suspicion is based not on what an officer subjectively believes, but on "an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate?" *Terry v. Ohio*, 392 U.S. at 21-22 (citation omitted). *Accord Graham v. Connor*, 490 U.S. —, 109 S.Ct. 1865, 1872 (1989). As this Court explained in *Scott v. United States*, 436 U.S. 128, 138 (1978), a case decided after *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975), upon which Buie relies, "the fact that [an] officer does not have the state of mind which is hypothesized by the reasons which provide the legal justification for the officer's action does not invalidate the action taken as long as the circumstances, viewed objectively, justify that action." *See also Maryland v. Macon*, 472 U.S. 463, 470-71 (1985) ("Whether a Fourth Amendment violation has occurred . . . [does] not [turn] on the officer's actual state of mind at the time the challenged action was taken."). Even the Court of Appeals of Maryland in this case recognized that an objective standard is appropriate. (Cert. Pet. Apx. 20-21).

The Court's decision in *United States v. Robinson*, 414 U.S. 218 (1973), illustrates the point in a closely related setting. In that case, a police officer conducted a thorough search of a defendant incident to that

defendant's arrest. The government conceded that in searching the defendant the officer "'was not motivated by a feeling of imminent danger,'" nor was the officer "'specifically looking for weapons.'" *Id.* at 236 n.7 (citation omitted). The Court explained that, "[s]ince it is the fact of custodial arrest which gives rise to the authority to search, it is of no moment that [the officer] did not indicate any subjective fear of the [defendant] or that he did not himself suspect that [the defendant] was armed." *Id.* at 236 (footnote omitted).

Here, too, the fact that the testifying officers may not have harbored a subjective fear of danger does not negate the objective basis for determining that the officers were, indeed, at risk. What is more, Buie mischaracterizes the record on this point. Although Officer Rozar agreed that he was not "worried about there being any danger," (J.A. 9), he made that statement in explaining why he had not searched the area around Buie, (J.A. 8-9). He was not asked, and did not address, the question whether there was any risk of danger from someone else in the house. Similarly, Officer Frolich's statement—that he "had no idea who lived" in Buie's house (J.A. 15)—cannot be taken as a concession that he had no fear that his safety might be in jeopardy. At best, this remark reflects that neither Officer Frolich nor the other officers could be sure who else might be present with Buie in the house. (J.A. 14).

Buie discounts the fact that Lloyd Allen remained at large at the time of the search, because the officers "never stated that they had [him] in mind while executing their duties." (Br. 23). But even if, as Buie suggests, the officers had not had Allen "in mind,"

that does not alter the fact that the accomplice actually was at large and could well have been with Buie in the house, only 48 hours after the robbery. Buie likewise discounts the presence of the unidentified female in the house, immediately before the search, contending that there was "no evidence to suggest an inclination on her part to attack the police or a capacity to pose a serious threat." (Br. 24). Although Buie correctly notes that there was no evidence to suggest, one way or the other, who the unidentified female might have been, he nevertheless hypothesizes that "she was one of the girls outside the house when the police entered." (Br. 24). There is no basis from which to draw any such conclusion, nor were the officers required to make the same assumption that Buie does. The simple fact remains that, under these or similar circumstances, the presence of an unknown person—any unknown person—may pose a considerable risk, and police officers must be entitled to protect themselves and others against that risk.

Buie also contends that the "nature of the charge" does not bear on the overall risk of danger. (Br. 25-26). This cannot be so. Crimes of violence, particularly ones that involve weapons, pose special risks for arresting officers. Given the gravity of the charge, unknown persons may be moved to interfere with the arrest. And, the possibility that firearms³ or other

³ Buie also disputes the suggestion that a "gun" was involved in the underlying offense. (Br. 25). In his view, the evidence showed only that an "armed robbery" had been committed, and "armed robbery," under Maryland law, means robbery with "a dangerous or deadly weapon." But "deadly weapons," even if not guns, pose serious risks to arresting officers and other people on the premises.

weapons may be available increases the danger of such interference. *United States v. Robinson*, on which Buie relies, does not hold to the contrary. The Court held in that case that the police may conduct a full search of a suspect incident to his arrest, regardless of the nature of the charge on which he has been arrested. 414 U.S. at 234-35. As the United States has suggested in its amicus brief at 20-21, it is possible to read *Robinson*, in the present context, as authority for an even *broader* rule than that which the State has urged, i.e., police officers may conduct a protective sweep following any and all custodial arrests in the home. In any event, *Robinson* offers no support for Buie's surprising suggestion that the police may not consider the type of crime involved in deciding whether to protect themselves against a risk of interference.

In sum, Buie's challenge to the sufficiency of the evidence ignores the requirement that, in assessing reasonable suspicion, a court must consider not a series of isolated factors, but rather "the totality of the circumstances—the whole picture." *United States v. Sokolow*, 490 U.S. ___, 109 S.Ct. 1581, 1585 (1989) (citation omitted). Here, when the whole picture is objectively considered, it is clear that the police in Buie's home possessed articulable suspicion, if not probable cause to believe, that third persons were present at the arrest scene.

CONCLUSION

Whether analyzed under the general reasonableness balancing test or under the *Terry* stop and frisk exception to the Fourth Amendment's warrant and probable cause requirements, the cursory security

check of Buie's basement was reasonable police conduct. Accordingly, for the reasons stated herein and in the State's principal brief, the judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted,

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AMICUS CURIAE

BRIEF

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CLERK

No. 88-1369

In the Supreme Court of the United States

OCTOBER TERM, 1989

STATE OF MARYLAND, PETITIONER

v.

JEROME EDWARD BUIE

ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER

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22 pb

QUESTION PRESENTED

Whether, having arrested an armed robbery suspect in his home pursuant to an arrest warrant, police officers may conduct a "protective sweep" of the premises on less than probable cause.

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In the Supreme Court of the United States

OCTOBER TERM, 1989

No. 88-1369

STATE OF MARYLAND, PETITIONER

v.

JEROME EDWARD BUIE

*ON WRIT OF CERTIORARI TO THE
COURT OF APPEALS OF MARYLAND*

**BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE SUPPORTING PETITIONER**

INTEREST OF THE UNITED STATES

This case presents an important question concerning the power of a law enforcement officer to protect himself when he arrests a suspect inside that suspect's home. Federal law enforcement authorities routinely make such arrests, and the resolution of this issue will determine the extent to which such officers may protect their safety by conducting a limited "protective sweep" of the premises.

STATEMENT

1. At about noon on February 3, 1986, two men entered a Godfather's Pizza restaurant on Annapolis Road in Prince George's County, Maryland. The taller of the men, who was wearing a red jogging outfit, held a handgun, while the shorter of the two ordered Laurie Graham,

the manager, to open the store's safe and cash register. After taking a sum of money, the two men left the store and drove away. About 15 minutes later, the police showed Ms. Graham several photographs, and she identified from among them two persons she recognized as the robbers. One of those was respondent, and the other was respondent's friend, Lloyd Allen. Tr. 1-44 to 1-48, 1-57 to 1-61, 1-74.

At a suppression hearing before trial, police officers James T. Rozar and Joseph Frolich explained that following the robbery the police obtained arrest warrants for respondent and Allen. On February 5, the police made arrangements to arrest respondent. To be certain that respondent was at home, a secretary at police headquarters made a telephone call to respondent's house. An unidentified female answered the telephone, after which the secretary spoke with respondent. About six or seven officers then went to respondent's house to execute the warrant. Pet. App. 3-4; Tr. 1-18, 1-21, 1-24.

Once inside the house, two officers covered the main floor, while two others went upstairs. Officer Rozar then announced that he would "freeze the basement" to ensure that no one could surprise the officers from behind. With his service revolver drawn, Officer Rozar shouted into the basement, ordering anyone who might be down there to come up. After two such calls went unanswered, respondent emerged from the basement and came upstairs. Officer Rozar arrested him and placed him in handcuffs. Pet. App. 4-5; Tr. 1-12 to 1-15, 1-24.

Concerned that someone else might be in the basement, Detective Frolich went downstairs. There, in plain view atop a stack of clothing, was a red jogging outfit that matched the one worn by the taller of the two robbers. Detective Frolich seized the suit, and it was later admitted

as evidence at trial. No one other than respondent was found inside the house. Pet. App. 5-6; Tr. 1-19 to 1-23; Tr. 2-48 to 2-49.

2. The trial court denied respondent's motion to suppress the jogging suit (Tr. 1-29), holding that "based on the facts of this case" the police "had a right to search" the basement and to seize the suit. The court explained that at the time respondent emerged from the basement "the police [did not] know how many other people [were] down there." Moreover, the court observed, respondent had been "charged with a serious offense." The trial court therefore concluded that the officers had "acted reasonably in this case * * *." *Ibid.*¹

Following a jury trial, respondent was convicted of robbery with a deadly weapon and using a handgun in the commission of a felony. On December 30, 1986, respondent was sentenced to a total of 35 years' imprisonment. Pet. 9; Tr. 2-136 to 2-137.

¹ During the trial proceedings, the prosecutor moved to reopen the suppression hearing and thereafter elicited additional testimony bearing on the seizure of the jogging outfit. Tr. 2-23 to 2-32. Testifying outside the presence of the jury, Detective Frolich explained that at the time he entered the basement he was armed not only with an arrest warrant for respondent, but also with an arrest warrant for his accomplice, Lloyd Allen. Frolich further testified that he knew at the time that respondent and Allen had once before been arrested for jointly committing armed robbery and that they had been "running together" at the time of the February 5, 1986 arrest. Finally, Detective Frolich stated the handgun had reportedly been involved in the robbery. Pet. App. 7 n.2; Tr. 2-23 to 2-27. The trial court adhered to its decision denying the suppression motion. Tr. 2-31 to 2-32. The Court of Special Appeals agreed with the trial court on the merits, but it found that there was no basis for reopening the hearing and it therefore refused to consider the additional testimony. Pet. App. 52-58. The court of appeals took the same view with respect to the reopening, holding that "any evidence introduced at the reopened hearing will not be considered on appeal." *Id.* at 7-8 n.2.

3. The Court of Special Appeals affirmed. Pet. App. 46-81. The court recognized that under the Fourth Amendment "the sanctity of a person's home—his castle—requires that the police may not invade it without a warrant except under the most exigent of circumstances." *Id.* at 74-75. It explained, however, that "once the police are lawfully within the home, their conduct is measured by a standard of reasonableness." *Id.* at 75. "[I]f there is reason to believe that the arrestee had accomplices who are still at large," the Court of Special Appeals stated, "something less than probable cause—reasonable suspicion—should be sufficient to justify a *limited additional intrusion* to investigate the *possibility* of their presence." *Id.* at 75-76 (emphasis in original).

In the present case, the Court of Special Appeals concluded, the police had met that standard. The court noted that Detective Frolich had gone into respondent's basement "to look for the suspected accomplice or anyone else who might pose a threat to the officers on the scene." Pet. App. 64. In conducting the protective sweep, the court added, the officers "knew two arrest warrants had been issued in connection with the armed robbery of the pizza shop." *Ibid.* Accordingly, the court reasoned, Detective Frolich "went downstairs not to search for evidence but to see if someone else was there * * * who might pose a danger to him or his fellow officers." *Id.* at 64-65.²

4. The court of appeals reversed by a divided vote. Pet. App. 1-45. The court explained that "[w]hen we assess the seriousness of an intrusion, whether it be a protective sweep or some other type, we consider the objective expectation of privacy that may exist, as well as the governmen-

² The Court of Special Appeals also upheld the trial court's decision to call respondent's cousin as the court's witness. Pet. App. 76-80. The petition does not present that issue.

tal interest served by the intrusion." *Id.* at 17. "Thus," the court continued, "when the intrusion is slight, as in the case of a brief stop and frisk on a public street, and the public interest in prevention of crime is substantial, reasonable articulable suspicion may be enough to pass constitutional muster." *Ibid.* By contrast, the court stated, "'when the sanctity of the home is involved, the exceptions to the warrant requirement are few.'" *Id.* at 18-19 (citation omitted). For that reason, the court held, "to justify a protective sweep of a home, the government must show that there is probable cause to believe that 'a serious and demonstrable potentiality for danger' exists." *Id.* at 19 (citation omitted).

Applying that standard, the court of appeals held that the protective sweep conducted by Detective Frolich was unlawful. The court recognized that at the time he entered the basement the officer was aware that respondent "had been accompanied by an accomplice, Allen, when the robbery was committed." Pet. App. 23. The court explained, however, that "the police had no information supporting a serious and demonstrable likelihood that Allen was in the dwelling at the time of [respondent's] arrest or had ever been or even visited there." *Id.* at 35. The court also acknowledged that "a gun had been used in the robbery," but it discounted that fact because the gun had not specifically been "mentioned at the suppression hearing." *Ibid.* And while the court recognized that the pre-arrest telephone call had indicated that a woman was present in the house along with respondent, the court concluded that there was not sufficient "probable cause to support a reasonable belief that an accomplice was in [respondent's] home, that other confederates might have been there, or that any other serious and demonstrable potentiality for danger existed." *Id.* at 35, 36. The court of appeals

therefore held that the red jogging suit should have been suppressed. *Id.* at 36-37.

Judge McAuliffe dissented in an opinion joined by two other judges. Pet. App. 38-45. The majority went astray, he explained, by "considering the intrusion in this case exactly as if it were a warrantless entry across the threshold of the home." *Id.* at 39. In fact, Judge McAuliffe noted, the officers "crossed the threshold of this home in strict compliance with the Fourth Amendment" because they had a warrant for respondent's arrest and they had reason to believe that he was at home. *Id.* at 40. Accordingly, he reasoned, "[t]he question in this case is not the nature of exigent circumstances required to justify the warrantless entry into a home, but rather the exigency that will justify a limited additional intrusion following a prior valid entry." *Ibid.*

In the present case, Judge McAuliffe stated, several factors demonstrate the reasonableness of the officers' intrusion. First, he noted, the fact that the police could have gone into the basement to seek out respondent before he came upstairs reduces "the level of expectation of privacy that the law will reasonably afford to [respondent] concerning items in plain view in the basement." Pet. App. 42. Second, Judge McAuliffe stated, the police did not conduct a "full-blown search[]," such as "the opening of desks or the examination of documents," but only a "limited search for a person or persons"—a search that is "less intrusive" and that "may be accomplished fairly quickly." *Id.* at 42-43. In addition, he observed, "[t]he police had probable cause to believe that the armed robbery which had occurred 48 hours earlier had been committed by two persons—[respondent] and Lloyd Allen" and "the police did not know how many * * * persons might have been present" in respondent's house. *Id.* at 43-44. Judge

McAuliffe concluded that it was reasonable for the police to make a quick sweep of the basement from which respondent had emerged, "whether to check for the presence of the accomplice who had so recently been involved with [respondent] and an armed robbery, or to protect themselves from others who might have been hiding with [respondent]." *Id.* at 44.

SUMMARY OF ARGUMENT

The court of appeals suppressed the red jogging outfit in this case because, in the court's view, a protective sweep in a suspect's home may be conducted only upon a showing of probable cause to believe that the police are faced with "a serious and demonstrable potentiality for danger." Pet. App. 19. We believe that the court of appeals set too high a legal threshold for searches of this kind. In our view, the correct standard is the one articulated by this Court in *Terry v. Ohio*, 392 U.S. 1 (1968), under which a modest intrusion may be justified where the police have a reasonable apprehension of danger. Applying that standard in the present case, we believe that the protective sweep of respondent's basement, and the seizure of the jogging outfit in plain view, were entirely lawful.

A. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable," *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985), and "what is reasonable depends on the context within which a search takes place" (*id.* at 337). The reasonableness of a particular search practice "is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985) (citation omitted).

Applying that balancing test, this Court in a line of cases beginning with *Terry v. Ohio*, *supra*, has held that where the intrusiveness of a search or seizure is minimal, and the interest in police safety is compelling, the search or seizure may be conducted provided the officer "possesses a reasonable belief based on 'specific and articulable facts which * * * reasonably warrant' the officer in believing" that he is at risk. *Michigan v. Long*, 463 U.S. 1032, 1049-1050 (1983) (quoting *Terry*, 392 U.S. at 21). We believe that the same rule should apply to sweep searches. A protective sweep—coming on the heels of a lawful arrest inside a suspect's home—constitutes a modest, incremental intrusion on the suspect's privacy, and is narrowly confined to places in which a confederate may be hiding. By contrast, the governmental interest in a protective sweep is surpassing. Indeed, the threat to an officer's safety during a custodial arrest may well exceed the risk presented by a typical *Terry* stop.

B. Under the standard articulated in *Terry*, the protective sweep of respondent's basement was justified, since at the time of the arrest the officers had a reasonable basis for believing themselves to be at risk. The officers knew that arrest warrants had been issued for respondent and his accomplice, Lloyd Allen, in connection with an armed robbery committed only 48 hours earlier. The prospect that Allen might be present in the house, armed and prepared to interfere with the arrest, was entirely plausible. Moreover, Allen was not the only person who may have surprised the officers; respondent's house had several levels, and more than one person could easily have lived in it. In fact, the testimony revealed that prior to the arrest, a police secretary had called the house, speaking first with an unidentified woman and then with respondent. The police did not locate the unidentified woman prior to

respondent's arrest, and she, too, could have been hiding in the basement at the time of the arrest.

ARGUMENT

THE "PROTECTIVE SWEEP" OF RESPONDENT'S BASEMENT WAS LAWFUL UNDER THE FOURTH AMENDMENT

A. Following An Arrest Inside An Arrestee's Premises, Police Officers May Conduct A "Protective Sweep" Of The Premises, Where They Have A Reasonable Belief That Their Security Is At Risk

1. Where the balance of competing interests permits, police officials may conduct searches and seizures without a warrant and on less than probable cause

a. "The fundamental command of the Fourth Amendment is that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 340 (1985). See *United States v. Montoya de Hernandez*, 473 U.S. 531, 537 (1985); *United States v. Villamonte-Marquez*, 462 U.S. 579, 588 (1983). Thus, "the Fourth Amendment does not proscribe all searches and seizures, but only those that are unreasonable." *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989). See *Carroll v. United States*, 267 U.S. 132, 147 (1925). The test of reasonableness, moreover, "is not capable of precise definition or mechanical application." *Bell v. Wolfish*, 441 U.S. 520, 559 (1979). See *Graham v. Connor*, 109 S. Ct. 1865, 1871 (1989). Rather, in defining the contours of the right to be free from unreasonable searches and seizures, this Court has repeatedly said that "'the specific content and incidents of this right must be shaped by the context in which it is asserted.'" *Wyman v. James*, 400 U.S. 309, 318 (1971) (quoting *Terry v. Ohio*, 392 U.S. 1, 9 (1968)). See

also *New Jersey v. T.L.O.*, 469 U.S. at 337 ("what is reasonable depends on the context within which a search takes place").

The Court has established a balancing test to govern this inquiry. "The permissibility of a particular law enforcement practice is judged by 'balancing its intrusion on the individual's Fourth Amendment interests against its promotion of legitimate governmental interests.'" *United States v. Montoya de Hernandez*, 473 U.S. at 537 (quoting *United States v. Villamonte-Marquez*, 462 U.S. at 588. See also *Delaware v. Prouse*, 440 U.S. 648, 654 (1979); *Camara v. Municipal Court*, 387 U.S. 523 (1967). This approach recognizes that not every invasion of privacy is prohibited by the Fourth Amendment, but only "arbitrary and oppressive interference by enforcement officials with the privacy and personal security of individuals." *United States v. Martinez-Fuerte*, 428 U.S. 543, 554 (1976). "Where a careful balancing of governmental and private interests suggests that the public interest is best served by a Fourth Amendment standard of reasonableness that stops short of probable cause, [the Court has] not hesitated to adopt such a standard." *New Jersey v. T.L.O.*, 469 U.S. at 341.

b. Applying that test, the Court has held that in the context of an ordinary criminal investigation both probable cause and a warrant are generally necessary to render a search reasonable. See *United States v. Karo*, 468 U.S. 705, 717 (1984); *United States v. United States District Court*, 407 U.S. 297, 317 (1972). But as the Court explained recently in *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. 1402, 1414 (1989) (citation omitted), exceptions from those requirements have been permitted "when 'special needs, beyond the normal need for law enforcement, make the warrant and probable-cause require-

ment impracticable.'" Where, for example, "the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search," *Camara v. Municipal Court*, 387 U.S. at 533, the Court has consistently held that a warrant is not required by the Fourth Amendment.³ Similarly, the Court has found that the probable cause standard is inappropriate where it would defeat the purposes that the search is designed to achieve.⁴

In *Terry v. Ohio*, *supra*, the Court applied those principles in a closely related setting. There, the Court held that the Constitution "permit[s] a reasonable search for weapons for the protection of the police officer, where he

³ See, e.g., *Skinner v. Railway Labor Executives' Ass'n*, 109 S. Ct. at 1416 ("the delay necessary to procure a warrant * * * may result in the destruction of valuable evidence"); *National Treasury Employees Union v. von Raab*, 109 S. Ct. 1384, 1391 (1989) (the mission of the Customs Service "would be compromised if it were required to seek search warrants in connection with routine, yet sensitive, employment decisions"); *Griffin v. Wisconsin*, 483 U.S. 868, 876 (1987) ("[a] warrant requirement would interfere to an appreciable degree with the probation system, setting up a magistrate rather than the probation officer as the judge of how close a supervision the probationer requires"); *New Jersey v. T.L.O.*, 469 U.S. at 340 (a warrant requirement "would unduly interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools"); *O'Connor v. Ortega*, 480 U.S. 709, 722 (1987) (plurality opinion) ("requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome").

⁴ See, e.g., *Griffin v. Wisconsin*, 483 U.S. at 878 (a probable cause standard "would reduce the deterrent effect of the supervisory arrangement"); *O'Connor v. Ortega*, 480 U.S. at 724 (plurality opinion) ("[t]he delay in correcting the employee misconduct caused by the need for probable cause rather than reasonable suspicion will be translated into tangible and often irreparable damage to the agency's work, and ultimately to the public interest"); *New Jersey v. T.L.O.*, 469 U.S. at 340-342.

has reason to believe that he is dealing with an armed and dangerous individual, regardless of whether he has probable cause to arrest the individual for a crime." 392 U.S. at 27. The Court explained that a frisk for weapons requires "swift action predicated upon the on-the-spot observations of the officer on the beat." *Id.* at 20. Accordingly, the Court added, a weapons search cannot be "subjected to the warrant procedure" but must instead "be tested by the Fourth Amendment's general proscription against unreasonable searches and seizures," under which the Court must "'balanc[e] the need to search * * * against the invasion which the search * * * entails.'" *Id.* at 20, 21. Applying that test, the Court acknowledged that a "protective search for weapons * * * constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person." *Id.* at 26. The Court held, however, that a weapons frisk is easily justified by "the more immediate interest of the police officer in taking steps to assure himself that the person with whom he is dealing is not armed with a weapon that could unexpectedly and fatally be used against him." *Id.* at 23. See also *Adams v. Williams*, 407 U.S. 143, 146 (1972).

The Court applied the same principles in *Michigan v. Long*, 463 U.S. 1032 (1983). In that case, the Court held that after a police officer stops a suspect for hazardous driving, he may search those places inside the passenger compartment of the suspect's car in which a weapon may be concealed, provided the officer "possesses a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons." *Id.* at 1049-1050 (quoting *Terry*, 392 U.S. at 21). Expanding the scope of the rule in *Terry*, the Court emphasized that "roadside encounters between police and suspects are especially hazardous, and that

danger may arise from the possible presence of weapons in the area surrounding a suspect." *Ibid.*

2. *Under these principles, the police may perform a "protective sweep" if, after arresting a suspect inside his home, they have a reasonable belief that their security is at risk*

We believe that the balance struck by this Court in *Terry* and *Long* applies here as well. A protective sweep—coming on the heels of a lawful arrest inside a suspect's home—constitutes a modest, incremental intrusion on the suspect's privacy, and is narrowly confined to places in which a confederate may be hiding. By contrast, the governmental interest in conducting a protective sweep is surpassing. A custodial arrest inside a house typically presents a greater risk of injury to police officers than a *Terry* stop, since it is likely to be prolonged and emotionally charged, and because an arrest inside a house involves more opportunities for ambush by the arrestee's confederates. A police officer should therefore be authorized to perform a protective sweep where, consistent with *Terry*, he has "a reasonable belief based on 'specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant' the officer in believing" that he is at risk. *Long*, 463 U.S. at 1049-1050 (quoting *Terry*, 392 U.S. at 21).

a. The court of appeals reasoned that a protective sweep following a suspect's arrest inside his house intrudes upon the sanctity of the home and, accordingly, may be justified only upon a showing of probable cause to believe that the situation presents "a serious and demonstrable potentiality for danger." Pet. App. 19. That conclusion overlooks the fact that a protective sweep takes place only after a suspect has been lawfully arrested inside his home—a factor that bears critically on the reasonableness of the search under the Fourth Amendment. As this Court explained in *Payton v. New York*, 445 U.S. 573 (1980),

"[i]f there is sufficient evidence of a citizen's participation in a felony to persuade a judicial officer that his arrest is justified, it is constitutionally reasonable to require him to open his doors to the officers of the law." *Id.* at 602-603. A warrant for a suspect's arrest—or probable cause and exigent circumstances—empowers the officers to enter the suspect's home, fan out through the premises, and continue to search, room by room, until they come upon him.

For those reasons, the existence of an arrest warrant (or probable cause plus exigency) significantly reduces a suspect's reasonable expectation of privacy. Armed with either a warrant or exigent circumstances, officers may "breach * * * the entrance" to the suspect's home. *Payton*, 445 U.S. at 589. As this Court has repeatedly explained, among the "zone[s] of privacy" protected by the Fourth Amendment, none is "more clearly defined" than "the unambiguous physical dimensions of an individual's home." *Ibid.* The "physical entry of the home is the chief evil against which the wording of the Fourth Amendment is directed." *United States v. United States District Court*, 407 U.S. 297, 313 (1972). See also *Welsh v. Wisconsin*, 466 U.S. 740, 748 (1984); *Steagald v. United States*, 451 U.S. 204, 211, 231 (1981). But the existence of a warrant for a suspect's arrest, or probable cause plus exigency, deprives the suspect of any reasonable expectation that he can shield the threshold of his home from official invasion.

Moreover, because an arrest warrant or probable cause plus exigency permits officers to seek out the suspect in any place he may be found, the suspect enjoys no reasonable expectation of privacy, until the moment of his arrest, in any of the rooms of the house—least of all, as in the present case, in the room in which he is actually hiding. See Pet. App. 42 (McAuliffe, J., dissenting). To be sure, once police officers have arrested a suspect, they may not continue to search for him; that search is obviously at an end. But as this Court has explained in another context, the fact

that a privacy interest has "been largely compromised" by a prior search "is highly relevant to the reasonableness" of the subsequent search. *United States v. Jacobsen*, 466 U.S. 109, 121 (1984). In light of the prior invasions, a protective sweep is, at most, "only an incremental intrusion on personal liberty." *Michigan v. Summers*, 452 U.S. 692, 703 (1981). Accordingly, as Judge McAuliffe noted in dissent, "[t]he question in this case is not the nature of exigent circumstances required to justify the warrantless entry into a home, but rather the exigency that will justify a limited additional intrusion following a prior valid entry." Pet. App. 40. Accord *United States v. Hoyos*, 868 F.2d 1131, 1142 (9th Cir. 1989) (Beezer, J., concurring in part and dissenting in part) ("When a lawful arrest occurs inside a house, the arrest itself reduces the owner's expectation of privacy: further exploration of the house under exigent circumstances affects privacy as a matter of degree").⁵

What is more, the scope of a protective sweep is narrowly cabined. Unlike a full-blown search incident to arrest, such as the one rejected by this Court in *Chimel v. California*, 395 U.S. 752 (1969), a protective sweep does not authorize officers "to open drawers" or "to physically move contents of * * * drawers from side to side." *Id.* at 754. To the contrary, like the weapons search in *Terry*, a protective sweep must be "strictly circumscribed by the

⁵ See *Michigan v. Summers*, 452 U.S. at 701-703 (in light of the warrant to search the premises, the brief detention of the occupant of a house was only marginally intrusive); *Pennsylvania v. Mimms*, 434 U.S. 106, 109 (1977) (in light of lawful decision to stop a driver, the Fourth Amendment "inquiry must therefore focus not on the intrusion resulting from the request to stop the vehicle * * * but on the incremental intrusion resulting from the request to get out of the car once the vehicle was lawfully stopped"). Cf. *United States v. Jacobsen*, 466 U.S. 109, 120-121 (1984) (in light of the prior opening of a package by private employees, the subsequent seizure by federal officials was not unreasonable).

exigencies which justify its initiation.' " 392 U.S. at 25-26. The only places that may be searched are those in which a person might be hiding. Moreover, the search may last only as long as it takes to ensure that no one is lurking elsewhere in the house.

b. While the intrusiveness of a protective sweep is minimal, the governmental interest at stake is of surpassing importance. In defining what is a reasonable search or seizure under the Fourth Amendment, this Court has repeatedly identified officer safety as a critical factor.⁶ "American criminals have a long tradition of armed violence," the Court has observed, "and every year in this country many law enforcement officers are killed in the line of duty, and thousands more are wounded." *Terry*, 392 U.S. at 23. Thus, in *Terry*, the Court refused to "blind [itself] to the need for law enforcement officers to protect themselves and other prospective victims of violence in situations where they may lack probable cause for an arrest." *Id.* at 24.⁷ Similarly, in extending *Terry* to places

⁶ The risk of violence to police officers is not the only governmental interest that may justify a protective sweep following a custodial arrest. For example, several courts have held that police may make a protective sweep of the premises to ensure that potential evidence is not lost or destroyed. See, e.g., *United States v. Vasquez*, 638 F.2d 507 (2d Cir. 1980), cert. denied, 454 U.S. 975 (1981). See also *Jackson v. United States*, 479 U.S. 910 (1986) (White, J., dissenting from denial of certiorari). In the present case, however, as in most cases, it is the risk to the arresting officers that justifies the protective sweep.

⁷ The Court held that "[w]hen an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed and presently dangerous to the officer or to others, it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and neutralize the threat of physical harm." 392 U.S. at 24.

within a suspect's reach, the Court in *Michigan v. Long*, *supra*, explained that "suspects may injure police officers and others by virtue of their access to weapons, even though they may not themselves be armed." 463 U.S. at 1048. Likewise, in *Michigan v. Summers*, *supra*, holding that the police may briefly detain the occupant of a house during the execution of a search warrant, the Court emphasized "the interest in minimizing the risk of harm to the officers." 452 U.S. at 702. And in *Pennsylvania v. Mimms*, *supra*, in which the Court upheld as reasonable an order directing a person stopped by the police to get out of his car, the Court found it "too plain for argument that the State's proffered justification—the safety of the officer—is both legitimate and weighty." 434 U.S. at 110; cf. *New York v. Quarles*, 467 U.S. 649, 657-658 (1984).

The risk of injury to police is particularly great during the execution of an arrest. See *New York v. Belton*, 453 U.S. 454, 457 (1981); *Chimel v. California*, 395 U.S. at 763. Indeed, in many respects the risk of injury may exceed the risk presented by a *Terry* stop. Whereas a stop may be "a severe, though brief, intrusion upon cherished personal security," *Terry*, 392 U.S. at 24-25, an arrest is typically prolonged, and decidedly more adversarial. An arresting officer must confront the arrestee, secure him in custody, and make arrangements to transport him elsewhere. Cf. *United States v. Robinson*, 414 U.S. 218, 234-235 (1973); *Ybarra v. Illinois*, 444 U.S. 85, 107 (1979) (Rehnquist, J., dissenting) ("the task performed by the officers executing a search warrant is inherently more perilous than is a momentary encounter on the street"). So, too, the arrest process is apt to be highly charged, because it constitutes "the initial stage of a criminal prosecution," *Terry*, 392 U.S. at 26, in which the government and the arrestee will be squarely at odds. And where the arrest takes place in a house—as opposed to a *Terry* stop,

which ordinarily occurs in a public setting—the prospect of ambush from unseen and unfamiliar areas is obviously much greater.⁸

c. In light of the competing interests, we believe that the standard articulated in *Terry* and *Long* should apply to protective sweeps as well. Under that standard, a police officer may conduct a protective sweep where he has “a reasonable belief based on ‘specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant’ the officer in believing” that he is at risk. *Long*, 463 U.S. at 1049-1050 (quoting *Terry*, 392 U.S. at 21).⁹ That standard has been endorsed

⁸ In 1981, for example, 19% of all assaults on law enforcement officers occurred while the officers were attempting to effect arrests. FBI, 1981 *Uniform Crime Reports* 307.

⁹ The Court’s decision in *Chimel v. California*, 395 U.S. 752 (1969), does not require a different standard. In *Chimel*, the Court, overruling certain of its prior decisions, held that police officers who have arrested a suspect in his home may not, as an incident to that arrest, conduct a search of the entire premises. The police officers in *Chimel*, however, made a thoroughgoing search of the premises (see *id.* at 754), and there was no suggestion that the search was, or could have been, justified by a reasonable belief that the officers were at risk. What is more, *Chimel* recognizes the interest in police safety, in that it expressly authorizes arresting officers to search “the area into which an arrestee might reach to grab a weapon.” *Id.* at 763.

The Court’s more recent decision in *Arizona v. Hicks*, 480 U.S. 321 (1987), is likewise not inconsistent with the rule we have urged. In *Hicks*, the Court held that the police could not examine concealed parts of a stereo system they had found in plain view during a search, conducted on exigent circumstances, following a shooting incident. In *Hicks*, however, the exigent circumstances justifying the search did not comprehend a search of the stereo—unlike the execution of a lawful arrest, which authorizes the police to look everywhere the suspect may be found. Moreover, the search of the stereo in *Hicks* was based on ordinary law enforcement interests and not, as here, on an immediate concern for officer safety.

by the overwhelming majority of the federal courts of appeals,¹⁰ as well as by the leading commentators.¹¹

In applying the “reasonable belief” standard, the courts have focused on a variety of factors. Where, for example, the authorities have specific information that other confederates remain at large, a protective sweep is likely to be approved.¹² The same holds true where the police have

¹⁰ See, e.g., *United States v. Kaylor*, No. 88-5393 (8th Cir. June 8, 1989), slip op. 11; *United States v. Castillo*, 866 F.2d 1071, 1079 (9th Cir. 1988); *United States v. Caraza*, 843 F.2d 432, 435-436 (11th Cir. 1988); *United States v. Escobar*, 805 F.2d 68, 71 (2d Cir. 1986); *United States v. Bernard*, 757 F.2d 1439, 1443 (4th Cir. 1985); *United States v. Riccio*, 726 F.2d 638, 641-642 (10th Cir. 1984); *United States v. Jones*, 696 F.2d 479, 487 (7th Cir. 1982), cert. denied, 462 U.S. 1106 (1983); *United States v. Hatcher*, 680 F.2d 438, 444 (6th Cir. 1982). See also *United States v. Gardner*, 627 F.2d 906, 910 (9th Cir. 1980) (Kennedy, J.) (to justify a protective sweep “[i]n this circuit, the Government must be able to ‘point to specific and articulable facts which, taken together with rational inferences from those facts, [would] reasonably warrant [the warrantless] intrusion’”). The Fifth Circuit in *United States v. Kolodziej*, 706 F.2d 590, 597 (1983), and the First Circuit in *United States v. Gerry*, 845 F.2d 34, 37 (1988), have stated that there must be a showing of probable cause. In the former case, however, it is not clear that the protective sweep could have been upheld even under the *Terry* standard (see 706 F.2d at 597), and in the latter case the court of appeals also described the governing standard as one of “reasonable belief” (845 F.2d at 37).

¹¹ See W. LaFare, *Search and Seizure* § 6.4(c), at 647 (2d ed. 1987); Joseph, *The Protective Sweep Doctrine: Protecting Arresting Officers From Attack By Persons Other Than The Arrestee*, 33 Cath. U.L. Rev. 95, 144-145 (1983); Kelder & Statman, *The Protective Sweep Doctrine: Recurrent Questions Regarding The Propriety Of Searches Conducted Contemporaneously With An Arrest On Or Near Private Premises*, 30 Syracuse L. Rev. 973, 1020-1022 (1979).

¹² See, e.g., *United States v. Hoyos*, 868 F.2d 1131, 1138 (9th Cir. 1989); *United States v. Valles-Valencia*, 811 F.2d 1232, 1236, modified on other grounds, 823 F.2d 381 (9th Cir. 1987); *United States v. Bernard*, 757 F.2d at 1443; *United States v. Reed*, 733 F.2d

no such specific information, but suspect from the nature of the crime or from other circumstances that other persons may be present at the scene of the arrest.¹³ In addition, a protective sweep is typically found reasonable where the principal arrest involves a shooting, or where weapons are known, or reasonably believed, to be on the premises.¹⁴ The violent nature of the underlying crime (or the typical association of the underlying crime with violence, as in the case of narcotics offenses) also bears on the reasonableness of the sweep search.¹⁵

d. A strong argument can be made, we believe, that even the "reasonable suspicion" standard is too restrictive, and that protective sweeps should be permitted whenever police conduct an arrest in a house and conclude that a quick sweep of the premises is necessary to ensure their safety. Such a principle, which would uphold the sweep procedure even if a court later concluded that it was not necessary, would have the advantages of creating a

492, 504 (8th Cir. 1984); *United States v. Irizarry*, 673 F.2d 554, 558 (1st Cir. 1982); *United States v. Manley*, 632 F.2d 978, 986-987 (2d Cir. 1980), cert. denied, 449 U.S. 1112 (1981).

¹³ See, e.g., *United States v. Escobar*, 805 F.2d at 71; *United States v. Jackson*, 778 F.2d 933, 936-937 (2d Cir. 1985), cert. denied, 479 U.S. 910 (1986); *United States v. Tabor*, 722 F.2d 596, 598 (10th Cir. 1983); *United States v. Baker*, 577 F.2d 1147, 1152 (4th Cir.), cert. denied, 439 U.S. 850 (1978).

¹⁴ See, e.g., *United States v. Kaylor*, slip op. 12; *United States v. Caraza*, 843 F.2d at 435; *United States v. Valles-Valencia*, 811 F.2d at 1236; *United States v. Standridge*, 810 F.2d 1034, 1037-1038 (11th Cir.), cert. denied, 481 U.S. 1072 (1987); *United States v. Rocio*, 726 F.2d at 642; *United States v. Irizarry*, 673 F.2d at 558; *United States v. Bruton*, 647 F.2d 818, 822-823 (8th Cir.), cert. denied, 454 U.S. 868 (1981); *United States v. Gardner*, 627 F.2d at 909-911.

¹⁵ See, e.g., *United States v. Hoyos*, 868 F.2d at 1138; *United States v. Castillo*, 866 F.2d at 1080-1081; *United States v. Marszałkowski*, 669 F.2d 655, 665 (11th Cir.), cert. denied, 459 U.S. 906 (1982).

"bright-line" rule for protective sweeps and avoiding the second-guessing of police judgments about when to take protective measures during an arrest. Compare *New York v. Belton*, 453 U.S. 454 (1981) (bright-line rule permitting search of passenger compartment of automobile incident to arrest of driver or passengers); *United States v. Robinson*, 414 U.S. 218 (1973) (bright-line rule permitting search of arrestees incident to all custodial arrests).

While such a clear rule would have significant advantages in its ease of administration and deference to on-the-spot police judgments, we believe that on balance the somewhat more restrictive "reasonable suspicion" rule better accommodates the competing interests. Unlike searches of the person incident to an arrest, protective sweeps have not historically been justified merely by the fact of an arrest. Compare *United States v. Robinson*, 414 U.S. at 230-235. In addition, the home has traditionally been the object of the highest level of Fourth Amendment protection. There is therefore good reason to require a case-by-case justification for an intrusion within the home, even where the intrusion, as in the case of a protective sweep, constitutes only a marginal extension of an already justified entry.¹⁶ Finally, the need for deference to on-the-spot judgments by the police can be accommodated under the reasonable suspicion standard, as long as that standard is applied liberally, with sensitivity to legitimate police concerns about safety and the need to resolve doubts in favor of actions taken to ensure security.

¹⁶ The "bright-line" rule would apparently permit the police to conduct a full sweep of an arrestee's home even if there was nothing about the crime that in any way suggested the possibility of violence, and even if the suspect were arrested at the threshold of his home and immediately removed. Because such results do not appear to satisfy the Fourth Amendment's requirement of reasonableness, we believe that a more case-specific rule of scrutiny is preferable.

B. The "Protective Sweep" Of Respondent's Basement Was Lawful

When they arrested respondent in the present case, the police had a reasonable belief that they were at risk. They were therefore entitled to perform a protective sweep of the premises. Several factors, all of which were elicited during the initial suppression hearing, support that conclusion.

When he entered respondent's basement, Detective Frolich knew that arrest warrants had been issued for respondent and for his accomplice, Lloyd Allen, in connection with an armed robbery committed only 48 hours earlier. The prospect that Allen might be present in the house, armed and prepared to interfere with the arrest, was entirely plausible. Moreover, Allen was not the only person who may have surprised the officers; respondent's house had several levels, and more than one person could easily have lived in it.¹⁷ In fact, the testimony revealed that prior to the arrest, a police secretary had called the house, speaking first with an unidentified woman and then with respondent. The police did not locate the unidentified woman prior to respondent's arrest, and she could easily have been hiding in the basement or elsewhere in the house at the time of the arrest.¹⁸

¹⁷ See *United States v. Caraza*, 843 F.2d at 436 ("Because the residence was a two-story structure, the arresting officers could not be certain whether others were in the house who might either pose a threat to the officers or need assistance.").

¹⁸ The court of appeals noted in passing (Pet. App. 14-15 n.4) that according to his testimony Officer Rozar "was not concerned about any danger" at the time that he decided to "freeze the basement." That suggestion misconstrues the record. Officer Rozar made that statement in explaining why he had not searched the area around respondent; he was not asked, and did not address, the question whether

The court of appeals discounted most of those factors, but its reasons for doing so are not persuasive. For example, although the court acknowledged that respondent's accomplice was still on the loose at the time of the arrest, it found no "serious and demonstrable likelihood that Allen was in the dwelling at the time * * * or had ever been or even visited there." Pet. App. 35. The police need not, however, await "a serious and demonstrable likelihood" of danger before taking steps to protect against it. See *Terry*, 392 U.S. at 24. The court also recognized that a gun had been used during the robbery, but it refused to consider that fact, because the gun had not specifically been "mentioned at the [initial] suppression hearing." Pet. App. 35. Again, that parses the evidence too finely. Although the officers did not state in so many words that respondent had used a weapon during the robbery, Detective Frolich explained that arrest warrants had been issued for respondent and his accomplice, charging them with armed robbery. Tr. 1-18. Finally, while the court found no reason for the police to fear that "other confederates" might be in the house, it did not consider the fact that the woman who answered the police secretary's phone call had not yet been accounted for at the time of respondent's arrest.

The court of appeals' treatment of the evidence was clearly affected by the probable cause standard that it believed to be applicable to protective sweeps. The rule

there was any risk of interference from someone else in the house. In any event, it does not matter, for purposes of the *Terry* standard, that a particular officer may lack a subjective apprehension of injury. "[I]n making th[e] assessment" required under *Terry*, "it is imperative that the facts be judged against an objective standard: would the facts available to the officer at the moment of the seizure or the search 'warrant a man of reasonable caution in the belief' that the action taken was appropriate." 392 U.S. at 21-22. See also *Graham v. Connor*, 109 S. Ct. at 1872.

in *Terry*, which we believe to be applicable in this context, does not permit the kind of second-guessing of reasonable inferences of danger that the court of appeals engaged in here. Police officers in these cases must make "quick *ad hoc* judgment[s]" (*United States v. Robinson*, 414 U.S. at 235), and courts "must be careful not to use hindsight in limiting the ability of police officers to protect themselves as they carry out missions which routinely incorporate danger" (*United States v. Coates*, 495 F.2d 160, 165 (D.C. Cir. 1974)). Because the police had a reasonable basis for believing themselves to be at risk at the time they arrested respondent, they were entitled under the Fourth Amendment to perform a protective sweep of the basement. The plain view seizure of the jogging outfit was therefore entirely lawful. See *Michigan v. Long*, 463 U.S. at 1050; *Coolidge v. New Hampshire*, 403 U.S. 443, 465 (1971); *Harris v. United States*, 390 U.S. 234, 236 (1968).

CONCLUSION

The judgment of the Court of Appeals of Maryland should be reversed.

Respectfully submitted.

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JULY 1989

AMICUS CURIAE

BRIEF

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In The
Supreme Court of the United States
October Term, 1989

THE STATE OF MARYLAND,
Petitioner,

--against--

JEROME EDWARD BUIE,
Respondent.

ON WRIT OF CERTIORARI
TO THE COURT OF APPEALS
OF MARYLAND

BRIEF AMICI CURIAE OF
AMERICANS FOR
EFFECTIVE LAW ENFORCEMENT, INC.,
JOINED BY
THE INTERNATIONAL ASSOCIATION OF
CHIEFS OF POLICE, INC.,
THE NATIONAL DISTRICT
ATTORNEYS ASSOCIATION, INC., THE
NATIONAL SHERIFFS' ASSOCIATION, INC.,
AND THE MARYLAND CHIEFS
OF POLICE ASSOCIATION, INC.,
IN SUPPORT OF THE PETITIONER.

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NATIONAL SHERIFFS' ASSOCIATION, INC.,
AND THE MARYLAND CHIEFS
OF POLICE ASSOCIATION, INC.,
IN SUPPORT OF THE PETITIONER.

This brief is filed pursuant to the Rules of the United
States Supreme Court. Consent to file has been granted

by Gary E. Bair, Assistant Attorney General, State of Maryland, Counsel for the Petitioner, and John L. Kopolow, Assistant Public Defender, Baltimore, Maryland, Counsel for Respondent. Letters of Consent of both parties have been filed with the Clerk of this Court, as required by the Rules.

INTEREST OF AMICI

Americans for Effective Law Enforcement, Inc. (AELE), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various State and Federal Constitutions.

AELE has previously appeared as *amicus curiae* eighty-two times in the Supreme Court of the United States, and thirty-eight times in other courts, including the Federal District Courts, the Circuit Courts of Appeal and various state courts, such as the Supreme Courts of California, Illinois, Ohio and Missouri.

The International Association of Chiefs of Police, Inc. (IACP), is the largest organization of police executives and line officers in the world, consisting of more than 14,000 members in 72 nations. Through its programs of training, publications, legislative reform and *amicus curiae* advocacy, it seeks to make the delivery of vital police services more effective, while at the same time protecting the rights of all our citizens.

The National District Attorneys Association, Inc. (NDAA), is a nonprofit corporation and the sole national organization representing state and local prosecuting attorneys in America. Since its founding in 1950, NDAA's

programs of education, training, publications, and *amicus curiae* activity have carried out its guiding purpose of reforming the criminal justice system for the benefit of all of our citizens.

The National Sheriffs' Association (NSA), Inc., is the largest organization of sheriffs and jail administrators in America, consisting of over 40,000 members. It conducts programs of training, publications, and related educational efforts to raise the standard of professionalism among the Nation's sheriffs and jail administrators. While it is interested in the effective administration of justice in America, it strives to achieve this while respecting all rights guaranteed under the Constitution.

The Maryland Chiefs of Police Association, Inc. (MCPA), is a not-for-profit organization of members who are police chiefs and senior law enforcement executives. It seeks to represent the concern of police administrators with the problems of crime and police effectiveness in dealing with crime, with special emphasis upon the problems and concerns of police officers who face numerous legal and practical problems on a day-by-day basis in their efforts to protect public safety.

ARGUMENT

THE DECISION OF THE COURT BELOW, IF AFFIRMED, WILL JEOPARDIZE THE SAFETY OF LAW ENFORCEMENT OFFICERS MAKING LAWFUL ARRESTS ON PREMISES PURSUANT TO ARREST WARRANTS.

Amici are professional organizations representing the interests of law enforcement agencies at the state and local levels. Our members include: (1) law enforcement officers and law enforcement administrators who are

charged with the responsibility of obtaining and executing arrest and search warrants, making warrantless arrests and searches, conducting interrogations, and investigating reports of crimes on and off premises, and (2) prosecutors, county counsel and police legal advisors who, in their criminal jurisdiction capacity, are called upon to advise law enforcement officers and administrators in connection with such matters, and to prosecute cases involving evidence obtained thereby.

Because of the relationship with our members, and the composition of our membership and directors -- including active law enforcement administrators and counsel -- we possess direct knowledge of the impact of the ruling of the court below, and we wish to impart that knowledge to this Court.

Amici will not discuss at length the case law analysis of the Petitioner State of Maryland in this case, although we generally agree with that analysis. Instead, we will concentrate upon policy issues raised by this case and our need as law enforcement administrators to ensure that law enforcement officers have sufficient guidance in the area of Fourth Amendment jurisprudence.

Amici, with our close involvement with the police community, know that police officers enter private homes for a variety of lawful reasons--e.g., to serve a warrant, to answer a call of distress, to take a routine report, or to render another service.

In the instant case, the officers entered the Respondent's (hereinafter referred to as defendant) house to serve an arrest warrant for him. They knew that the defendant and an accomplice had committed an armed robbery two days before. A magistrate had made a probable cause determination and issued arrest warrants for both men on the same day as the robbery.

The entry of defendant's house fully comported with the requirements of *Payton v. New York*, 445 U.S. 573 (1980).

After entering the house pursuant to the warrant, the officers began looking for the defendant and anyone else who might be present. Among other things, they yelled down the basement stairway for the defendant. After defendant emerged from the basement and was arrested, the police entered the basement and observed in plain view a red running suit that matched the description of clothing worn by one of the robbers. The trial court declined to suppress this evidence and the Maryland Court of Special Appeals affirmed the denial of the motion to suppress. *Buie v. State*, 72 Md. App. 562, 531 A.2d 1290 (1987).

The Maryland Court of Appeals reversed, holding that the brief, superficial search of the basement violated the Fourth Amendment because the officers lacked probable cause to believe that the defendant's accomplice in the armed robbery or other third persons might be in the basement. *Buie v. State*, 314 Md. 151, 550 A.2d 79 (1988).

The Court of Appeals was sharply divided, 4-3. The dissenters stated, *inter alia*:

The type of search that was conducted in this case was justified under the circumstances. Buie was arrested only after hiding in the basement. Sergeant Dunn had yelled down into the basement when the police arrived, but received no response. Corporal Rozar then twice yelled into the basement for anyone to come out before Buie finally responded. The police had probable cause to believe that the armed robbery which occurred 48 hours earlier had been

committed by two persons -- Buie and Lloyd Allen. The police had obtained arrest warrants for, and were looking for, both of them. Contrary to the statement in the majority opinion that "to the best of [the police officers'] knowledge, Buie and an unidentified girl or woman were the only occupants of the dwelling," the police did not know how many persons were in the home. They knew that Buie and a woman were present -- they did not know how many more persons might have been present. For the police to make a quick sweep of the basement from which Buie had emerged was reasonable, whether to check for the presence of the accomplice who had so recently been involved with Buie and an armed robbery, or to protect themselves from others who might have been hiding with Buie.

550 A.2d at 87-88.

Amici submit that the search in this case was sustainable on the basis of a search for weapons or evidence pursuant to the rule in *Chimel v. California*, 395 U.S. 752 (1969) and *United States v. Robinson*, 414 U.S. 218 (1973), or as a **protective sweep** of the premises for the safety of the officers. Such a brief, cursory search (protective sweep) comports with the principles of *Terry v. Ohio*, 392 U.S. 1 (1968) (frisk of person) and *Michigan v. Long*, 463 U.S. 1032 (1983) (cursory search of passenger compartment of automobile).

Protective sweeps of this sort are sometimes recognized as a balancing of the exigencies of the situation against the limited nature of the search, by cases such as *United States v. Baker*, 577 F.2d 1147 (4th Cir.), *cert. denied*, 439 U.S. 850 (1978), and require at

most only a reasonable or articulable suspicion that there are third persons on the premises who pose a threat to the safety of the officers, *United States v. Castillo*, 844 F.2d 1379 (9th Cir. 1988); *United States v. Gardner*, 627 F.2d 906 (9th Cir. 1980).

Professor Wayne LaFave, in reviewing the cases on protective sweeps of the sort conducted in this case, notes as follows:

Where the person already in custody was arrested for a recent offense committed by him and one or more other persons, it would seem reasonable for the police to undertake a cursory inspection of the balance of the premises to see if the confederate is presently hiding there. In such a case, there exists probable cause to arrest the confederate, and while the probability of his presence may not be substantial enough that it would have warranted entry for that purpose alone, this should not foreclose police already lawfully on the premises from undertaking the slight additional intrusion necessary to ascertain if the confederate is in fact there.

* * *

Indeed, "the fundamental principle underlying *Chimel* -- that officers have a right to assure their safety -- is of general applicability," and thus supports the notion that police may sometimes look elsewhere in the premises to guard against the chance that third parties may offer resistance. This notion also finds support in *Terry v. Ohio* [...]

* * *

[...][I]t would seem to follow that less than probable cause in the traditional sense is required to justify a police "protective sweep" into other parts of the premises where the arrest occurred. It would make little sense to say that police may take protective measures against those known to be present, but that they may never stray beyond the room of the arrest to see if there are others present who, by virtue of their location, may be in an even more advantageous position to offer forcible resistance on behalf of the arrestee.

4 LaFave, Search and Seizure, Sec. 6.4(b) and Sec. 6.4(c), pp. 643-647, 2nd Ed. (footnote case authorities omitted).

The principle of a protective sweep for known accomplices or unknown third parties was recognized by this Court in *Payton* where the Court noted tangentially that in making arrests on premises, "...the police may need to check the entire premises for safety reasons." 445 U.S. at 589. Even if such a right is not automatic, but must be based upon at least a reasonable or articulable suspicion, it was present in the instant case where the police knew of the existence of the accomplice, had a warrant for the arrest of the accomplice, and the crime was a serious felony involving weapons. Even without specific information that the accomplice or third persons were actually present on the premises, the protective sweep was reasonable under both *Terry* and *Chimel* rationales. As Professor LaFave notes, "where the arresting officers are not possessed of concrete information tending to show that other persons are presently in the premises entered, the dominant consideration is the seriousness of the criminal conduct

for which the arrest was made, considering all the known circumstances." 4 LaFave, Search and Seizure, Sec. 6.4(c), p. 648, 2nd Ed. (footnote case authorities omitted). Here, of course, the police had probable cause to believe that the defendant and his accomplice had committed armed robbery.

Additionally, we ask the Court to be mindful of the potential dangers inherent in making each and every arrest. In 1986 (the most recent statistics we found) more than 200 officers were ambushed, without warning. Three officers were killed in unprovoked attacks. See Sourcebook of Criminal Justice Statistics, 1987, U.S. Dept. of Justice, Bureau of Justice Statistics (GPO: Wash. D.C.), Tables 3.126 and 3.131, pp. 351 and 354.

The point that *amici* wish to stress is that, based upon our experience with our constituency of working law enforcement officers, the safety issue involved -- whether it be for known accomplices or possible dangerous third parties or weapons on the premises -- is of paramount concern. We urge this Court to allow law enforcement officers to visually inspect all interconnected rooms and closets in a dwelling, for the limited purpose of determining who is present therein. This is not the intrusive inspection condemned by the Court in *Arizona v. Hicks*, 480 U.S. 321 (1987), where the officer physically moved stereo equipment to view the serial numbers.

If the Court is unwilling to allow a protective sweep anytime an officer makes an arrest, at the very least, the quantum of justification should be no more than an articulable reason or suspicion.

Such a suspicion could be supplied by any of several applicable factors:

1. a reasonable belief that an accomplice exists; or,

2. the offense involved a weapon or threat of deadly force; or,

3. whether the suspect is an ex-felon (and therefore likely to know and associate with other ex-offenders); or,

4. other circumstances, as part of the totality of circumstances reasonably believed to be present at the scene of arrest.

Regarding ex-offenders, it should be remembered that they have a high propensity to commit serious crimes after their release from prison. Despite parole regulations to the contrary, ex-offenders frequently associate on a social basis with other ex-offenders. If this were not the case, ex-offenders could not easily find accomplices to assist them in the perpetration of future crimes.

Some of the associates of ex-offenders are armed. Purely by coincidence of timing, they may be in the home of the person sought on a warrant at the time it is served. An ambush of police officers could result. When serving warrants on ex-offenders, prudent police officers will routinely check all the rooms and closets of a premises for other persons, to safeguard themselves from a surprise attack by an unknown assailant. Must they blind themselves to evidence observed in plain view during these visual inspections?

Amici further submit that a rule more stringent than this will bear a heavy cost in police injuries and deaths. No civilized society would knowingly require a probable cause standard at this price. Indeed, as recorded by Professor LaFave, *supra*, the majority of courts that have considered the issue appear to have rejected the probable cause standard in known accomplice and generalized sweep cases.

Law enforcement administrators are charged with the

duty of adopting and implementing policies and procedures that protect not only the constitutional rights of citizens during the performance of law enforcement functions, but also the *safety of law enforcement officers charged with carrying out such functions*. To that end law enforcement agencies should adopt and implement professional standards and policies that incorporate these concerns. AELE, IACP, NDAA, NSA, and MCPA encourage the adoption of model standards and policies for their respective constituencies. IACP maintains a *National Law Enforcement Policy Center* for the development of model policies on critical issues as determined by an advisory board of police chiefs and others.

Amici submit that a clear pronouncement by this Court on officer safety in cases involving lawful arrests on premises will greatly encourage the promulgation of law enforcement practices and policies that will not only protect the constitutional rights of our citizens, but the safety of our law enforcement officers as well.

CONCLUSION

Amici respectfully request this Court to reverse the decision of the Maryland Court of Appeals on the basis that (1) the search in this case fully comported with the requirements of the Fourth Amendment, and (2) police officers may conduct cursory sweeps of premises for weapons, accomplices or other third parties when making a lawful arrest of a subject on the premises.

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